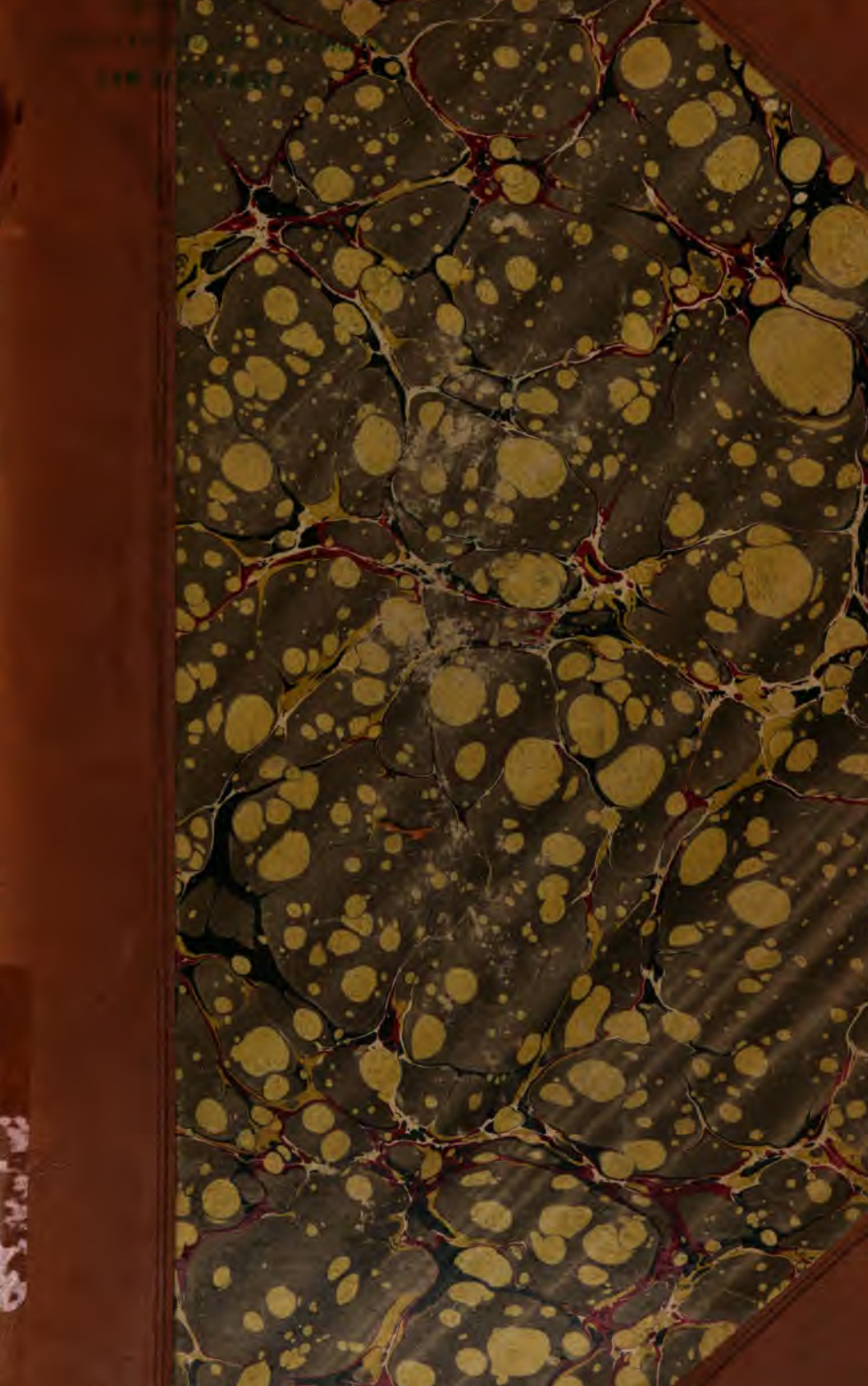

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THE

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QUARTERLY REVIEW OF JURISPRUDENCE.

No. CX.

ART. I.—SIR SAMUEL ROMILLY,—AS AN ADVOCATE, A JURIST, AND A LEGISLATOR.[1]

THE name of Sir Samuel Romilly, like the spell of an enchanter, awakens every feeling that responds to all that is good, and noble, and elevated in human nature. One cannot but feel that the whole of his existence was devoted to the benefit and amelioration of his species.

He was the third surviving child and second son of Mr. Peter Romilly, and was born in the city of London on the 1st of March, 1757. His father was descended from a highly respectable and influential French Protestant family, who had been obliged to quit their country—the south of France—by the revocation of the Edict of Nantes, the great Toleration Act of France, and who, for several years preceding the birth of Romilly, had been settled in England. The circumstances of his early youth, and the characters of his parents, are feelingly portrayed by himself in a narrative which he penned in 1796; and his own position in life, and the progress he had made in his profession, in another narrative, which he subsequently composed in the year 1813. These have both been given to the world in the "Memoirs of his Life, and a Selection from

[1] The substance of this paper was read before the Juridical Society, December 17, 1855. It has been kindly contributed by its author, W. H. Bennet, Esq.

his Correspondence," published by his sons long after his death, namely, in 1840. In the first, which appears to have been carefully corrected by him in the latter years of his life, he details, in the most feeling and interesting manner, his own thoughts and the circumstances of his family till he had arrived at the age of sixteen. At this period of his life he says:—"But it is time to say something of my education, if the little instruction I ever received from masters deserves to be so called. My brother and myself were sent, when we were very young, to a day-school in our neighbourhood, of which the sole recommendation seems to have been that it had once been kept by a French refugee, and that the sons of many refugees were still scholars at it. All the learning which it afforded we were to receive; but the utmost that our master professed to teach was reading, writing, arithmetic, French, and Latin,—and the last was rather inserted in his bill of fare by way of ornament, and to give a dignity and character to the school, than that there was any capacity of teaching it, either in our master or in any of his ushers." After describing the ignorance and brutality of this master, and stating the intention of his father to place him with an attorney in the City, whose character is very humorously given, and then another of procuring for him a seat in the counting-house of an eminent mercantile firm there, all which intentions were however abandoned,—he describes his new employment in his father's business of a jeweller, and gives some interesting details in regard to his course of study, and the great efforts which he made for self-improvement. This portion of his autobiography is very delightful to peruse, and conveys at the same time a most useful lesson of the success which has attended, and will ever attend, a determined and persevering course of study. The result was, that in the space of two years young Romilly had acquired a most excellent education; which goes far to show the great superiority of voluntary self-culture over the formal and rigid curriculum of public schools.

Shortly after this, a change took place in his father's pecuniary circumstances, from a legacy of considerable amount which had been bequeathed to the family by a relative of his

mother's; and a second project was agitated, for his being placed with Mr. Lally, one of the six clerks in the Court of Chancery, for a period of five years. Of this gentleman Romilly says:[1]—"A strong natural understanding, improved by much reading and much knowledge of the world, a high sense of honour, the purest integrity, a very brilliant fancy, great talents for conversation, an extraordinary flow of spirits, and a most convivial disposition, were the predominant characteristics of this amiable and estimable man." It must be admitted that he was singularly fortunate in his association with so talented and benevolent an individual. In this employment he had the opportunity of constantly frequenting the Court of Chancery, attending the Masters' and other public offices,—thus laying the foundation of great practical knowledge of the mechanical and subordinate grounds of his profession. In these occupations, however, he says he found no amusement; and during their continuance he made the acquaintance of the Rev. John Rogêt, the officiating clergyman of the French chapel attended by the family, who afterwards married his sister. Mr. Rogêt was a gentleman of taste, eloquence, and varied acquirements, and subsequently became the means, by his encouragement and advice, of fixing in Romilly the desire of distinguishing himself at the Bar. His disinclination to take that part of the legacy left to the family, to which he was entitled, out of the hands of his father, in whose business it had been invested, and with which it had been intended he should have purchased a similar place in the Six Clerks' Office to that which Mr. Lally then filled, was an additional inducement to him to look to the Bar for profit and distinction. He consequently entered himself of Gray's Inn at the age of twenty-one, and became the pupil of Mr. Spranger, an Equity draughtsman. His studies to attain proficiency in his profession seem to have been of the most intense and persevering description. Amongst his other reading it may be noticed that at this time the works of M. Thomas had fallen into his hands; he read with attention and much interest his *éloge* of the Chancellor Duguesseau, and he says, that "the career of glory which Thomas represents that illus-

[1] See his Life, vol. i. p. 28.

trious magistrate to have run, had excited, in a very great degree, my ardour and ambition, and opened to my imagination new paths of glory." His unremitting study had a very prejudicial effect upon his health. He proceeded to Bath for the benefit of the waters there; but, unluckily, a law library having been put up for sale by auction, he purchased many of the books, renewed his studies, and aggravated his ailments, so much so, that he returned to London in the greatest prostration and despondency. He, however, was gradually attaining convalescence when the riots of Lord George Gordon, in 1780, broke forth, and as one of a volunteer corps of his Inn, he stood sentry at Gray's-Inn gate several nights under arms. This again threw him back; even then, unable from ill-health and a restless excitement to resume his legal studies, he, as a diversion, began to read and study the Italian language, and found, he says, "considerable entertainment in the novelties which the literature of Italy presented to him." Eventually, family circumstances having rendered it advisable that he should accompany the infant child and nurse of his brother-in-law to Geneva, he started, as was not at that time an unusual course, to proceed to Switzerland by easy journeys of thirty miles a day. He passed a month at Geneva, his health daily improving; he mixed freely in society, and made many valuable acquaintances with men who subsequently became eminent; amongst others, with Dumont. His acquaintance with this celebrated man soon ripened into the most firm and sincere friendship, which lasted during the remainder of their lives. He returned home by way of Paris, and there also formed friendships with D'Alembert, Diderot, and other men of note; as also with a Madame Delessert, with whom he subsequently maintained a long correspondence, and of whom he gives a most flattering description. One passage in the second autobiographical sketch of his life[1] is remarkable, and ought to be remembered; it is:—"There is nothing, indeed, by which I have through life more profited, than by the just observations, the good opinion, and the sincere and gentle encouragement of amiable and sensible women." On his return, he was called to the Bar of Gray's

[1] Life, vol. i. p. 66.

Inn in Easter Term, 1783, and chose the Midland Circuit, upon which he entered in the spring of 1784. Of the principal members of this Circuit he gives an interesting account. During the sittings of Parliament he, at this time, appears to have been an assiduous attendant in the two Houses, particularly the gallery of the House of Commons, and to have transmitted, from time to time, to his friends at Lausanne and elsewhere, the substance of all the arguments relied upon by the speakers on both sides of a question, with his own remarks upon the peculiar style, the tone of voice, the talents and the characters of the principal members of the House.

He also furnished them with observations on the passing topics of the day, entering very much into detail; and in animated and descriptive language, giving the particulars of the riots of 1780, the part which he had taken in them; the origin, progress, and termination of the French, Dutch, and American wars; the state of India, and other important subjects. For nearly ten years he derived little or no pecuniary advantage from his attendance on the circuit; but having accidentally heard it remarked by Mr. Justice Heath that "there was no use in going a circuit without attending Sessions," he adopted that course, and became a member of the Warwick Quarter Sessions. Here his business first began to increase; indeed, he had not attended many times before he was employed in all the business there. This naturally increased his engagements on circuit and in town. About 1797 he had acquired distinction as a leader in the Court of Chancery, to the practice in which he had then limited his exertions; and the promotion of Sir John Scott (afterwards Lord Eldon) to the bench of the Common Pleas in 1799, opened to him a new career of exertion and profit. In January, 1798, Romilly married; in Michaelmas Term, 1800, he was advanced to the rank of King's Counsel, and from that period to the day of his death, he was the undisputed leader of the Equity Bar. In 1802, during the long vacation, he, with his wife, made a hasty visit to Paris, during which he kept a diary of the remarkable events then taking place, and wherein he records, with great particularity, his visits to several of the Courts of Law. One entry is too remarkable to

omit, as it shows that it had occurred to his most practical and benevolent mind, that the mode of conducting our own criminal prosecutions, so far as regards the non-examination of the prisoner, was by no means such as to be conducive to a thorough investigation of the truth. After stating the facts of a case of forgery, tried before the *Tribunal Criminel,* he says: "After every witness was examined, an examination of the prisoner took place by the judges. This would have much shocked most Englishmen, who have very *superstitious notions of the rights and privileges of persons accused of crimes.* It should seem, however, that if the great object of all trials be to discover truth, to punish the guilty, and to afford security to the innocent, *the examination of the accused is the most important, and an indispensable part of every trial.* I observed one objection to it, however, which is, that the judges often endeavour to show their ability, and gain the admiration of the audience, by their mode of cross-examining the prisoner. This necessarily makes them, as it were, parties, and gives them an interest to convict."

In 1805 he received the appointment of Chancellor of Durham, which was presented to him by the then bishop, under the most pleasing and flattering circumstances. He says:[1]— "The bishop came to me one day below the Bar of the House of Lords, after the business I was attending on was concluded, and offered it to me, with many compliments more flattering than the offer itself. Till then the bishop had almost been a stranger to me; I had indeed been counsel in different causes, both for him and against him, but had never met him in company, and had spoken to him only once before." Many earnest and powerful solicitations had been made to the bishop on behalf of other persons; but it was with this limited knowledge of Romilly that the bishop appointed him. He accepted it. He says:—"Attorneys and Solicitors General had of late hardly thought themselves at liberty to refuse it; and I was partly afraid of incurring the reproach of being solely intent upon amassing a fortune by my labours. I was actuated, too, by another, though not a very powerful motive; I was desirous of

[1] Life, vol. ii. p. 109.

trying the experiment how I should acquit myself, and how I should feel, in a judicial office."

In 1806 Romilly was appointed Solicitor-General; from that time he dates his public and parliamentary life, and thenceforward kept a diary of all such transactions in which he engaged, as he considered might be of any importance to the public or to himself.

Shortly after his appointment as Solicitor-General, he was elected member for Queenborough, and first took his seat in the House of Commons on the 24th March, 1806. On the same day he was appointed one of the committee to manage the trial of Lord Melville. Within a day or two afterwards, he assented, at the request of Mr. Wilberforce, to speak and take an active part in the measures for the abolition of the slave-trade. The first time he addressed the House was on the 17th April, 1806, in committee upon a Bill to declare that a witness could not by law refuse to answer a question, on the ground that his answer might subject him to a civil suit; and he was successful in obtaining the rejection of a proviso introduced by the then Master of the Rolls, Sir William Grant, that the witness might object to answer any question which, as a defendant to a Bill in Equity, he could not be compelled to answer. At the dissolution in November, 1806, he was again elected member for Queenborough. In the spring of the following year, on a change of administration, he ceased to be Solicitor-General, being succeeded by Sir Thomas Plumer, and from that time was never again in office. After the dissolution of Parliament on the Catholic question, he was, in May, 1807, elected for the borough of Horsham, in the interest of the Duke of Norfolk; and in his diary of the following month of July, on the opposition offered to a Bill, introduced by him, to dispense with the necessity of delivering office copies of Bills in Chancery to members, we find the following entry, which may serve as an index to his general conduct, on all occasions where his intentions in favour of effecting salutary reforms were opposed, with a probability of being wholly thwarted:—"But we found that the Bill so altered would meet with opposition, and would probably be lost; and *I thought it better to do the little good that*

was allowed me, rather than by attempting too much, fail of doing anything."

In the early part of 1808, a petition having been presented against his election for Horsham, he was unseated by the committee; and in April following, he was re-elected for Wareham. From this time until the dissolution in 1812, he regularly attended his parliamentary duties, when, in October of that year, he was proposed for Bristol, but defeated; and shortly afterwards he was returned as member for Arundel. In July, 1818, Parliament was again dissolved, when he was urgently solicited to be a candidate for the representation of a great number of places—Liverpool, Chester, London, and also for Westminster; with the requisition from which last-named constituency he complied; and after the most exciting election which has perhaps ever occurred in the memory of any one now living, he was, on the fifteenth day, returned at head of the poll, the numbers being nearly 6,000 in his favour, although he had never made the slightest solicitation to any voter, or even made his appearance on the hustings. It is quite impossible to convey to those who (unlike the writer) did not witness it, an adequate picture of the popular enthusiasm with which the issue of this prolonged contest was greeted by the assembled multitudes; and in a short speech—his first appearance before the electors—Romilly expressed, in strong and simple language, the feelings with which their confidence had inspired him.

An anecdote connected with this election, which came within the writer's own knowledge, and is not generally known, may be mentioned. A most zealous partizan of the Whigs, who had himself formerly been in Parliament, a personal friend of Sir Samuel, and who was at the time one of the Committee of Management of Drury Lane Theatre, wishing that Romilly should be accompanied with all possible *éclat* on his return home, had engaged a magnificent band, and the whole of the supernumeraries of the Theatre, to make a numerous procession for his chairing; but when they arrived at Burlington House, and were forming for that purpose, it was to their dismay discovered, that the object of their good intentions had, after concluding his address of thanks, quietly left the house, and elbowed his

way, unobserved, through the dense crowds to his chambers in Lincoln's Inn.

Sir Samuel Romilly did not, however, long survive this election, or take his seat in the House as member for Westminster, dying prematurely, at the very climax of his fame, on the 2nd November, 1818, and was interred in the same grave with his wife at Knill, in Herefordshire.

Having thus sketched out the principal events in the life of Romilly, reference must be made to his merits as an advocate, a jurist, and a legislator.

The motives which governed his conduct in these several characters would doubtless best appear from his autobiography, and his political diary. It would, indeed, be wholly beyond the scope of this slight memoir to particularize every occasion on which the knowledge, the talents, and the perseverance of the eminent individual now under our notice, were exerted in the forum or before Parliament. In the first place, a few observations on his character as an advocate.

It is not a little remarkable that Romilly never seems to have cordially liked the profession he had chosen. His correspondence with many persons after his entry at Gray's Inn, extending from the year 1783 to 1800, amply testifies to this curious fact, attaining, as he subsequently did, almost the highest rank in that profession. His mind was evidently pressed upon by topics of more general application to the human race: The Slave-Trade, the Political Position of Europe, the Works of Howard upon Prison Discipline, the Disqualifications of the Roman Catholics, the earlier Proceedings of the Great French Revolution, the Insurrection at St. Domingo, the Education of the Lower Classes in England,—in short, any philanthropic subject, rather than the course of his law studies, is the familiar topic of his letters; and it is somewhat singular that, neither in his correspondence, in his diary, nor in any of his published works, are there any allusions to legal publications, or to the reports of the decisions of the Courts, which, however, he must have read and carefully studied. In a letter to a lady, dated December, 1791, is the following passage: "The most important transaction that has taken place in my life for a long time, and one

which, for a very powerful reason, I ought to communicate to you, is that I have changed my chambers, and that your future letters are not to be addressed to Gray's Inn, but to Lincoln's Inn, No. 2, New Square. I have changed much for the better, as a situation for business; but much for the worse, as far as my own pleasure is concerned. Instead of having a very pleasant garden under my windows, I have nothing but houses before me, and I can't look any way without seeing barristers or attorneys. This is another sacrifice which I have made to a profession which nothing but inevitable necessity forces me to submit to, which I every day feel more and more that I am unfit for, and which I dislike the more, the more I meet with success in it."

By great industry and labour, nevertheless, Sir Samuel Romilly attained such perfection in the practice of forensic eloquence as rendered him the most elegant, the most refined, at the same time the most nervous and forcible speaker at the Equity bar in the past, and (with all due deference) in the present age. It has been truly remarked of him, that in transacting the most ordinary forensic business, there was a peculiar grace about his manner, a gentlemanly ease, an unpresuming suavity that won the hearts of all his hearers. One faculty of an advocate he possessed above all competition: he never deviated from the point under discussion. Although called upon as he repeatedly was, to speak upon the spur of the moment, and necessarily unprepared, he never wasted time by unnecessary or frivolous remarks, or dwelt long upon matters of minor importance; but kept the question in hand as the landmark of his address. Having in early life had many opportunities of hearing him both in his Court and in the House of Commons, nothing struck me at the time with more surprise, than the great difference between the character of his address at the Bar, and that before the House of Commons. Somewhat apathetic in manner, with downcast looks, and a tinge of melancholy on his countenance, resting his hands upon his upright brief, he poured forth the full and ready stream of language applicable to the case before the Court; but in the House of Commons, taking up the subject under discussion upon the

broadest grounds of public policy, with an earnest and animated tone of voice, he stood erect, and was by no means wanting in that energy of manner and action so useful and becoming in a mixed popular assembly. Indeed he was a splendid exception to the general rule, that lawyers fail as orators in Parliament. As a specimen of his forensic abilities, I need only refer to one of the many of his reported speeches, on behalf of the plaintiff in the well-known case of Huguenin *v.* Baseley.[1] I may add that he was a great master of sarcasm, and did not fail to use it on a fitting occasion; but that, as a general rule, he considered it an unfair weapon, and only to be sparingly employed.

His character as jurist is so intimately blended with his exertions as a legislator, that the two may be disposed of by observations which will equally apply to both; I therefore, reserve my remarks on this head; it may be sufficient to say that his ideas upon general jurisprudence, so far as they may be collected from his written and published works, are to be found in these publications. His first essay was written in 1788, being "Remarks on the Prison of the Bicêtre in Paris." The circumstances attending this were somewhat curious. Having made the acquaintance of Mirabeau at Paris, on his return from Switzerland, he had visited the prison of the Bicêtre, and was much shocked and disgusted with what he there saw, both in the hospital and the prison. On mentioning to Mirabeau, the following day, the impressions they had made on him, he was requested to put down the result of his observations in writing. He soon afterwards did so; Mirabeau translated them into French, and published them as his own, in the form of a pamphlet, under the title of "Lettre d' un Voyageur Anglais sur la Prison de Bicêtre." The work was suppressed by the police at Paris, and Romilly afterwards published his original sketch as a translation of the French pamphlet, and it appeared in a work of the time called "The Repository." The next was his Essay or Tract "On the Constitutional Power and Duties of Juries in cases of Libel." This was published by the Constituent Society, and obtained for him the first introduction to

[1] 14 Ves. 273.

and patronage of Lord Lansdowne. Another is his answer to "Madan's Thoughts on Executive Justice," which combated the doctrine put forth in that work, that certainty and the rigid enforcement of the penal code as it then existed, should be the guide for all judges and others in similar positions. He also published a tract or pamphlet on the Criminal Laws, in 1810, of which there was a second edition called for the following year. There is also a paper written by him in 1816, on the "Codification of the Law." It is to be found in the fifty-seventh number of the *Edinburgh Review*, and well deserves the attention of every one desirous of information upon this subject. There were found amongst his papers, after his death, various essays and papers upon legal, political, and social subjects, which it has not been thought expedient to publish. There is also a paper at the end of the third volume of the Memoirs of his Life, entitled, "Letters to C.;" in which he passes in review many projects for the public good. I have selected a few of these, as they may furnish topics for attentive reflection by the members of this Society, as well as important subjects for discussion at some of our future meetings. They, however, require some master-mind to be devoted to their consideration, and whose position and influence may lead them onward to a happy termination. These are:—To abolish certain injurious legal fictions, such as that *lis pendens* is notice to all the world; to establish a general registry of deeds; that some greater form or solemnity than is now necessary, ought to be required in wills of personal estates; on the promulgation of laws; on a written code of laws; on unauthorized reports of judicial proceedings: on divorces among the poor; on a public prosecutor; on the regard to be had to sex, age, and condition of life in inflicting punishment; on transportation; on confession and denial after conviction; on judicial superstition; to promote and improve public education in all orders of society; to reform the Universities and to establish in them new professorships; and last, though not least, the abuses in the Ecclesiastical Courts, and the reformation of ecclesiastical jurisdiction generally.

I approach his character as a legislator with considerable

distrust of my own ability to describe it. The subjects upon which he spoke, and the measures which he introduced into Parliament, were so numerous and varied, and his success so infinitely beneath what he had a right to expect from the uprightness of his motives, that I must confine myself to a few. On the threshold of his entry into the House of Commons, he was appointed one of the managers on the trial of Lord Melville, and to him was assigned the duty of summing up the evidence which had been given in support of the impeachment. This he did, and it was acknowledged on all hands to have been a spirited and masterly performance; it occupied nearly four hours in the delivery. The subject of the slave-trade; the severity of military and naval punishments; the discontinuance of lotteries; the liberty of the press; the diminishing the expense and shortening the duration of proceedings in Chancery; the amendment of the bankrupt laws; the reform of the Courts of Justice in Scotland; the making real estates assets for the payment of debts; a general registration of deeds; the education of the poor; the diminishing taxes on law proceedings; the sale of seats in Parliament; cruelty to animals; the building of penitentiary-houses, and the mischiefs of transportation; the delays in the House of Lords and Courts of Chancery; the impropriety of binding parish apprentices at a distance from their homes; the altering the punishment for high treason, and taking away corruption of blood in cases of treason and felony;—are only a few of the many subjects upon which his learning, his zeal, and his patriotism were exerted. And above and before all must be noticed, his untiring and unceasing efforts to bring about the amelioration of the bloody character of our criminal code as it then existed.[1] His exertions in this respect will never be forgotten, and it is to be remembered that almost every suggestion of his upon this subject has been happily carried out by subsequent legislative enactments. He himself was well aware of the impossibility of accomplishing all *he wished.*

[1] It strikes the mind with horror to reflect that when Sir Samuel Romilly first commenced his praiseworthy exertions for the reformation of the Criminal Code, he found on the Statute Book nearly 200 offences equally punishable with death.

He said, "What I have it in contemplation to do, *compared with what should be done,* is very little indeed."

In speaking of Sir Samuel Romilly as a legislator, I must not omit to allude, however briefly, to his exertions in favour of the reformation of the abuses of charities, and those in favour of parliamentary reform. With regard to the latter, I cannot forbear to quote one passage from his speech, in support of Sir F. Burdett's motion for a committee on the state of the nation. He said that "he should not vote for it from any vain hope of popularity,—not from any expectation of being able to gratify those who now influence public opinion on this subject, but from a sincere, a deep-rooted conviction, that some reform is necessary. I am a friend neither to universal suffrage nor annual Parliaments; I even doubt whether I am prepared to go, all at once, so far as to make the right of voting at elections co-extensive with taxation; but for some reform, for some material change in the present system, I am, and long have been, a zealous advocate. At an early period of my life, long before I had a seat in Parliament, when from the gallery of this House I first witnessed its deliberations, I heard Mr. Pitt with all the generous ardour of youth, and with the same eloquence which distinguished his mature age, pleading the cause of parliamentary reform, I became sensible of the necessity of the measure. The impressions which were then made on my mind have never been effaced. Subsequent reflection and experience (more particularly since I have myself become a member) have only served to confirm them."

Probably there never was an instance of such perfect disinterestedness and contempt for undue patronage than his conduct on the discussion on the Duke of York's case, where the whole body of the court party and almost all the influential lawyers were opposed to inquiry and punishment. The following is from his diary, under date the 13th March, 1809:—

"There is nothing so injudicious as to talk in the House of Commons of a man's own disinterestedness; it is the topic which the House, with great reason, hears dwelt on with the most impatience. I thought, however, I might, on this occasion (the conduct of the Duke of York), be allowed to

observe that my vote did not concur with my interest, and I concluded my speech with these words: 'It has been observed by a learned gentleman (Burton) in this debate, at the close of his speech, that *he* has nothing to hope for or to fear on this side the grave. I cannot say the same thing. Not labouring under the same affliction as he does, and not arrived at the same period of life,[1] I may reasonably be allowed, for myself, and for those who are most dear to me, to indulge hopes of prosperity which is yet to come. Reflecting, too, on the vicissitudes of human life, I may entertain apprehensions of adversity and of persecution which perhaps await me. I have, however, the heartfelt satisfaction to reflect that it is not possible for me to hope to derive, in any way, the most remote advantage from the vote on this occasion which I shall give, and from the part which I have thought it my duty to act.'" Immediately after the delivery of this speech, he received addresses and votes of thanks for his disinterested conduct from innumerable influential places,—from the livery, and from the common council of London, the inhabitants of Westminster and Southwark, the freeholders of Middlesex, the inhabitants of Norwich, Nottingham, Sheffield, Worcester, Reading, Liverpool, and from public meetings of many counties.

I must conclude this faint outline of the character of Romilly as a legislator by referring to the last speech which he ever made in the House of Commons on a Bill relating to the law of naturalization, and which gave him an occasion to paint, in glowing terms, the misconduct of the expiring Parliament. This has always been considered, though expressed in severe and even dark colours, as unexampled amongst all the efforts of his eloquence. He said: "Sir, I do not know what course the House is about to adopt, although, from the eagerness with which the question has been taken up on the other side, I cannot help suspecting what that course will be,—a course utterly unwarrantable as it regards the individuals more immediately concerned, and wholly repugnant to the spirit of all Parliamentary proceeding. Deeply involved as our privileges are in the question, yet, as this Par-

[1] Mr. Burton was seventy years of age, and afflicted with blindness.

liament will, in all probability, be dissolved in a very short period, I fear its last act will be an act of signal injustice. Such, however, will be *a fit close* of the greater part of our proceedings. Apprehending that we are within a few hours of the termination of our political existence, before the moment of dissolution arrives, let us reflect on the deeds for which we have to account. Let us recollect that we are the Parliament which, for the first time in the history of this country, *twice* suspended the *Habeas Corpus* Act in a time of profound peace. Let us recollect that we are the confiding Parliament, which intrusted his Majesty's ministers with a power (emanating from that suspension), that when it was no longer wanted, they might call Parliament together, and surrender it into their hands, although they subsequently acknowledged that the necessity of retaining that power had long ceased to exist. Let us recollect that we are the same Parliament which consented to indemnify his Majesty's ministers for those abuses and violations of the law of which they had been guilty in the exercise of the authority thus vested in them; that we are the same Parliament which refused to inquire into the grievances stated in the numerous petitions under which our table groaned; that we turned a deaf ear to the complaints of the oppressed,—that we even *amused ourselves* with their sufferings. Let us recollect that we are the same Parliament which sanctioned the employment of spies and informers by the British Government, debasing that Government, once so celebrated for good faith and honour, into a condition lower in character than that of the French police. Let us recollect that we are the same Parliament which sanctioned the issuing of a circular letter to the magistracy of the country by a Secretary of State, urging them to commit and hold to bail for libel before indictment found, and promulgating the opinions of the king's attorney and solicitor general as the law of the land. Let us recollect that we are the same Parliament which sanctioned the shutting of the ports of this once hospitable nation against unfortunate foreigners flying from persecution in their own country.

"This, sir, is what we have done; and we are about to crown the whole by the present most violent and unjustifiable act.

Who our successors may be I know not, but God grant that this country may never see another Parliament as regardless of the liberties and rights of the people, and of the principles of general justice, as this Parliament has been."

As a summary of this brief sketch of the life and character of Sir Samuel Romilly, I may say, that he never had an enemy. He was revered at the Bar. No man, for one moment, ever entertained the shadow of a doubt as to the complete purity of his motives. He was anxiously and patiently listened to by an admiring Senate, consisting, as it then did, of giants in intellectual power. He was never unconcerned in any measure which affected the happiness of individuals, the welfare of his country, and the general interests of mankind. He was always a zealous and consistent advocate for peace. He was opposed to the Corn Laws (even in those days), and to all restrictions on commerce. He proved to demonstration how much more effectually certainty, than the rigour of punishment, operates in the suppression of crime. He possessed a firm and innate love of liberty, and from this, as a fixed and predominant principle, all his exertions flowed. Consistency was the main feature of all his actions in public and in private life; and when a lawyer of the Crown, he never ceased to be the advocate of the people. It is consolatory to reflect, that his exertions were not wholly employed in vain; that the fruits of many of those blossoms which were so profusely shown in his lifetime have since ripened into maturity; and that there is scarcely one of the great improvements which now pervade our political and social system which had not, in its inception, presented itself to his capacious mind, and, at his instance, been made the subject of public discussion. I conclude in the words of a congenial spirit—the good and philanthropic Wilberforce: "He was a man in whom public and private excellence were so united, and so effectually balanced, that it is difficult to say which had the predominance. Those who knew him only a member of Parliament will probably hold that his *public* principles had the predominance; while those who have enjoyed his friendship will feel satisfied that the general benevolence of his views and projects was even exceeded by the endearing qualities of his *domestic* life."

To the foregoing view of Sir Samuel Romilly, in the threefold character of advocate, jurist, and legislator, we are enabled, through the courtesy of its author, and with the kind permission of Mr. Charles Purton Cooper, Q. C., to append some extracts —in which we think our readers will be interested—from an unpublished MS., contained in the Library of Lincoln's Inn, being an *éloge* pronounced on Romilly by Mons. Benjamin Constant before the Athénée Royal in Paris, on the 26th December, 1818. The eminent individual just named thus commences his oration:—

"Messieurs,—Vous avez désiré qu'un des fondateurs de l'Athénée prononçât dans cette enceinte l'éloge d'un étranger illustre, qui appartient à tous les pays, parcequ'il a bien mérité de tous les pays, en défendant la cause de l'humanité, de la liberté, et de la justice. Vous avez daigné de me charger de ce soin, parceque, ayant moi-même, durant l'époque tristement célèbre de 1815 et 1816, été accueilli avec amitié par l'homme regrettable auquel vous avez voulu décerner cet homage, j'ai vu de plus près ses vertus privées, ses travaux patriotiques, et la considération dont tous les partis l'entouraient. L'un des avantages d'un système de liberté réelle et paisible, c'est que chaque parti fait réciproquement envers les hommes éminens de l'opinion contraire, ainsi à récompenser d'un suffrage noblement impartial l'intégrité du caractère, la pureté des vues, et la supériorité du talent. Cet avantage survit même quelquefois à la liberté qui l'avait produit; et cette contrée, qui, pour avoir attenté souvent aux droits des autres peuples, et avoir prétendu se faire un monopole de ces droits qui appartiennent à la vaste famille de l'espèce humaine, voit, par une rétribution rémunératrice, sa propre constitution ébranlée et presque détruite, conserve néanmoins encore quelque temps la tradition d'une équité généreuse dans son intérieur et envers ses citoyens distingués."

Having thus introduced his subject, the eloquent speaker, after touching upon the more striking incidents in Romilly's career, and making pathetic allusion to his domestic life, thus proceeds:—

"Le Chevalier Romilly, dans sa qualité privée de juris-consulte,

en consacrant ses talens à défendre des causes particulières devant la Cour de Chancellerie et la Chambre des Pairs, fut considéré, presque dès l'entrée de sa carrière, comme l'oracle de la loi. Un homme qui a occupé pendant longtemps, et qui occupe aujourd'hui, une place des plus éminentes, a dit une fois d'un autre homme, qui est tombé de la place plus éminente encore, à laquelle l'avaient porté des facultés prodigieuses, mais désordonnées, que cet homme était *la loi vivante*. Ce mot, qui est absurde quand on fait une flatterie pour un despote, devient sublime, quand il se trouve être vrai, pour un citoyen qui n'est investi que de l'empire de la raison. Toute l'Angleterre l'appliquait au Chevalier Romilly. Sa science immense, sa modération, qui n'ôtait rien à son energie, sa profonde sagacité, son équité incorruptible, donnaient aux opinions qu'il présentait aux juges, la force et la gravité d'une autorité judiciaire. En se déclarant en faveur d'une cause, il la démontrait juste d'avance, et son nom dictait, pour ainsi dire, l'arrêt qui allait être prononcé.

" J'arrive à sa carrière publique. Un champ bien plus vaste s'ouvre ici devant nous. Sans doute les vertus privées sont dignes de toute notre vénération, mais les services rendus à un peuple entier se placent plus haut encore. Heureux qui peut faire quelque bien à ses contemporains ! Plus heureux qui peut en faire en même temps à ses contemporains et aux générations qui se succèdent ! La nature a établi entre les générations une noble correspondance ; elles s'éclairent sans se voir, et s'enrichissent sans se connaître. Les vérités utiles forment une masse éternelle à laquelle chaque individu porte son tribut particulier, certain qu'aucune puissance ne retranchera la moindre partie de cet impérissable trésor. L'ami de la liberté et de la justice lègue de la sorte aux siècles futurs la précieuse partie de lui-même. Il la met à l'abri de l'injustice qui le méconnaît, et de l'oppression qui le menace : il la dépose dans un sanctuaire dont les passions avilissantes ou féroces ne sauraient approcher. Celui qui par la méditation découvre un seul principe, celui dont la main trace une seule vérité, celui dont l'éloquence établit victorieusement une institution salutaire, peut, sans inquiétude, abandonner sa vie aux peuples ou aux tyrans, souvent aussi

injustes les uns que les autres. Il n'aura pas exister vainement; sa pensée reste empreinte sur l'ensemble indestructible, à la formation duquel rien ne peut faire qu'il n'ait pas contribuer.

"L'idée dominante de Sir Samuel Romilly et son occupation principale, dans tout le cours de sa vie, furent d'améliorer la loi criminelle d'Angleterre. Ici, messieurs, je dois relever une confusion d'idées trop habituelle qui s'est glissée dans beaucoup d'esprits. Nous ne distinguons pas suffisamment la législation pénale de l'Angleterre de sa procédure criminelle. La législation pénale chez les Anglais est barbare, comme celle de tous les peuples qui ont conservé les lois des siècles antérieurs, moins éclairés par conséquent, moins humains, et moins justes; mais les formes de la procédure Anglaise, l'esprit qui anime les juges, le pouvoir presque discrétionnaire que l'excessive sévérité de la législation fait dans la pratique tomber en leurs mains, enfin, et plus que tout, l'institution de *jury*, corrigent cette législation rigoureuse.

"Pour bien connaître le système de Sir Samuel Romilly, il faudrait lire les observations qu'il publia en 1810 sur les lois criminelles de l'Angleterre. Vous y verriez, messieurs, que dans aucun pays, une aussi grande variété des actions humaines n'est punie de la perte de la vie; que sous Henri VIII. soixante-douze mille personnes périrent légalement par la main du bourreau; que sous Elizabeth quatre cent personnes par an furent exécutées. Vous y verriez que l'acte de voler dans une boutique un objet de plus de six livres de notre monnaie, ou même quelquefois de la valeur de treize-pence, ou de vingt-six sols de France, ou d'enlever des poules dans une cour fermée, est un crime capital. Mais vous y verriez aussi que, comme il arrive toujours quand les lois sont atroces, ces lois ne sont pas exécutées, et que de 1803 à 1810, de 1,872 personnes mises en jugement pour ces actes, une seule a subi la mort.

"Ce système de maintenir une législation féroce en principe, et de l'adoucir par la pratique, avait été défendu par des écrivains célèbres. Tout ce qui existe, comme tout ce qui a existé, a le privilège de trouver des défenseurs. Ces apologistes prétendaient qu'il est bon que la loi ourdisse un vaste filet, enveloppant, sous le nom de crimes, toutes les actions contraires à

l'ordre public, de manière à frapper tous les esprits d'une terreur uniforme ; et que la pratique doit laisser ensuite, tantôt aux jurés, qui peuvent déclarer qu'un fait démontré n'est pas constant, tantôt aux juges, qui peuvent détourner l'application de la loi, tantôt au monarque, dépositaire suprême de la clémence, la faculté discrétionnaire de modifier ces excessives rigueurs.

" Le Chevalier Romilly prouve très-bien qu'un pareil système n'est dans le fait qu'une suspension continuelle de la loi écrite, c'est-à-dire, un arbitraire organisé, qui vaut mieux, sans doute, que l'application impitoyable de lois sanguinaires, mais qui jette une incertitude désastreuse sur toutes les suites des actions humaines, et transforme la législation pénale en une loterie de mort, où les lots inégaux sont départis suivant les différens caractères des juges, leur disposition momentanée, la manière dont ils sont frappés par les souvenirs du passé, ou vaincus par les émotions présentes, à l'instant où ils prononcent l'arrêt redoutable.

" Il rend une justice éclatante aux juges d'Angleterre, et, malgré mon désir de ne pas m'arrêter inutilement dans la carrière assez longue que vous m'avez ordonné de parcourir, je cède au besoin de citer quelques unes de ses paroles touchantes et vraies.

" ' Personne,' dit-il, ' ne peut assister aux séances de nos cours criminelles, et observer la conduite de leurs membres, sans être profondément ému du soin avec lequel les juges s'efforcent de remplir leurs importans devoirs envers le public, leur parfaite impartialité, leur désir sérieux d'éviter l'erreur et de protéger l'innocence en poursuivant le crime, l'absence totale de toute distinction entre le riche et le pauvre, le puissant et l'opprimé, sont des faits reconnus et dignement appréciés par la nation entière. Sur ces points essentiels, tous nos juges sont animés du même esprit, et, quelles que soient les nuances de leurs opinions, ils marchent sur la ligne de l'intégrité d'un pas uniforme.' Heureux le pays dans lequel l'opposition peut témoigner ainsi en l'honneur de l'autorité judiciaire ! Certes, la constitution Anglaise a hérité de beaucoup d'imperfections ; elle a subi beaucoup d'altérations alarmantes. Mais l'administration de la justice conserve néanmoins des longues habitudes de la liberté, ses formes tutélaires, ses scrupules délicates, son

respect religieux pour le droit de la défense, et les privilèges sacrés de malheur. En Angleterre jamais les juges n'interrompent l'accusé, ou s'ils l'interrompent, c'est pour l'éclairer, quand il se nuit, et pour le préserver de lui-même. Ils ne lui refusent point la liberté de répondre; après avoir complaisamment prêté l'oreille à l'accusateur, ils ne se font point un mérite de l'embarrasser par des questions captieuses, par des apostrophes insultantes, par des commentaires ironiques, un infortuné que trouble déjà sa position pénible. Ils n'infligent point un supplice anticipé à celui qui n'est l'objet encore que de soupçons, erronés peut-être, en le forçant d'entendre en silence les outrages que pourraient lui prodiguer la vanité, l'amour misérable du succès, la puérile ambition de se montrer éloquent, lorsqu'on ne devrait penser qu'à être juste. Aussi, les juges en Angleterre ne se plaignent-ils point que l'ordre judiciaire ne soit pas suffisamment respecté; les hommes n'ont jamais d'intérêt à rabaisser ce qui les protège, et l'instinct national respecte toujours ce qui est respectable. Mais en faisant profession publiquement de son estime pour les individus auxquels la distribution de la justice est confiée, Sir Samuel Romilly voulait que la sureté des citoyens dépendît des lois, et non pas des hommes. Il savait que les garanties qui ne réposent que sur des vertus personnelles sont précaires et insuffisantes, et que l'ordre sociale existe précisément pour que les hommes ne se mettent pas à la place de la loi.

" Il voulait donc réformer la législation pénale de sa patrie. Il y a réussi, à quelques égards, et, sans sa mort prématurée, la Grande Bretagne aurait vu probablement s'effacer de son code beaucoup plus de sévérités inutiles, beaucoup plus de dispositions d'une latitude effrayante, beaucoup plus de statuts où la législature semble avoir oublié qu'une proportion équitable entre les peines et les débits est indispensable, pour que la justice ne devienne pas impuissante, en révoltant l'humanité.

" Mais ce n'était pas dans les lois criminelles uniquement que le Chevalier Romilly désirait l'introduction d'améliorations importantes. Il demandait le perfectionnement de beaucoup d'autres parties des institutions Anglaises. Il réclamait l'abo-

lition de toutes les lois où l'intolérance s'est réfugiée (chose étrange) sous le prétexte de la liberté. Il proposait une organisation plus égale et moins oligarchique du système électoral.

"Ses idées sur les réformes étaient toutefois exemptes de cette impatience dangereuse qui, ne calculant pas l'état de l'opinion et les forces de la résistance, fatigue trop souvent cette opinion par des essais prématures, et provoque cette résistance par des violences intempestives. Son principe général, comme il l'avait annoncé en 1806, dans la Chambre des Communes, c'était qu'il faut tendre toujours à adopter les lois à l'esprit du siècle et de la nation, mais que les choses nuisibles même demandent à n'être détruites qu'avec prudence, parceque leur durée les a inévitablement combinées avec des choses qui sont utiles.

"Maintenant, messieurs, nous allons entrer dans une carrière nouvelle. Nous allons suivre le Chevalier Romilly dans une sphère—je ne dirai pas plus élevée que celle où je vous l'ai montré jusqu'ici, car il n'y a rien de plus élevé que la défense de la vie des hommes—mais dans une sphère plus propre à attirer sur lui l'attention publique; parcequ'il va être appelé à influer sur les mésures du Gouvernement de sa patrie, et par conséquent sur les destinées de l'Europe entière.

"Lorsque le désir de la paix (devenue l'opinion dominante de la nation Anglaise) eut forcé la Cour, en 1806, à rouvrir à Charles Fox l'entrée des conseils du roi, et à composer un ministère dans lequel beaucoup de talens se trouvaient réunis, Sir Samuel fut nommé par le ministère à la place de Solliciteur-Général de la Couronne, c'est-à-dire, à l'emploi qui correspond dans ce pays à celui de Procureur-Général en France. Ce nom, messieurs, suggère diverses idées, suivant la diversité des temps, des hommes, et des contrées. Dans des temps fâcheux, sous Henri VIII. par exemple, ou sous Louis XI., un Procureur-Général pouvait être la terreur de l'innocence, l'effroi des accusés, le fléau de la pensée, l'ennemi des vérités courageuses, l'émule de l'inquisiteur qui interprète les phrases, torture les mots, et proscrit les lumières. Dans des temps meilleurs, il peut être l'organe impartiale de la justice, le protecteur bienveillant de la faiblesse, le soutien généreux de

l'indépendance des opinions. Chacun, en acceptant cette place, choisit le rôle qui lui convient et la réputation qu'il mérite. Vous devinez sans peine quel fut le choix du Chevalier Romilly. Un seul fait suffit pour vous faire connaître sur quelle ligne il voulut marcher. Durant une année (au bout de laquelle il déposa ses fonctions parceque ses amis sortirent du ministère) il n'y eut un seul procès pour libelles. Et certes vous n'ignorez ni la liberté dont jouissent, ni même la licence que se donnent les écrivains, où, pour adopter l'expression ingénieusement inventée par les gens qui veulent agir sans qu'on appelle l'examen sur leurs actes, les pamphlétaires Anglais. Cependant l'Angleterre fut-elle en péril? Non, messieurs; tant il est vrai que l'arbitraire qu'on invoque comme un moyen de paix est la véritable et souvent l'unique source des désordres!

"Libre de toute place à la nomination de pouvoir, Sir Samuel Romilly se livra tout entier à ses devoirs de membre de la Chambre des Communes, devoirs augustes, mission la plus précieuse qu'un citoyen puisse remplir, et selon moi, je l'avoue, la plus éclatante qu'un ambitieux puisse désirer.

"Si je voulais, messieurs, parcourir, même rapidement, les divers objets que le Chevalier Romilly a traité dans cette chambre, et sur lesquels il a réclamé toujours, et fait triompher quelquefois, les principes de l'humanité, de la liberté, et de la justice, je vous retiendrais ici pendant plusieurs heures, ou je serais obligé de vous prier de m'accorder plus d'une séance. C'est à regret que je me refuse à retracer en détail tant de nobles travaux, tant d'efforts indéfatigables. Je cède, pourtant, à cette nécessité rigoureuse, et je ne vous montrerai pas Sir Samuel Romilly défendant la liberté de la presse, et la sainteté du jugement par jurés, contre des ennemis que sont partout les mêmes, et qui reproduisent partout les mêmes sophismes. Mais je dois m'arrêter sur son opinion relativement au droit qu'ont les mandataires de la nation d'examiner les jugemens rendus, et, pour me servir de ses propres expressions, de surveiller les tribunaux. Oui, messieurs, il pensait que le droit du parlement était non seulement de provoquer des réformes dans les lois, mais de s'assurer que les juges, et même les jurés, leur restaient fidèles. D'après ces principes, il dénonce le 20 Mai,

1818, la sentence prononcée par un *jury* en faveur d'un maître d'esclaves, qui avait infligé à une de ces malheureuses victimes un châtiment plus cruel que la loi ne le permet. A cette occasion, il fut opposé par plusieurs membres de Communes qui ne partageaient point ses opinions habituelles. M. Wilberforce, parlant sur la question, dit que c'était un des plus précieux privilèges de la Chambre—protectrice de la liberté civile—d'exercer toutes les fois qu'elle le jugerait nécessaire le pouvoir de rechercher et de contrôler la conduite de chaque cour de justice. Un membre du Gouvernement—M. Goulburn—reconnut pleinement l'autorité qu'avait la Chambre de faire des enquêts en toutes sortes de matières, quoique déjà décidées par les tribunaux. Tous les partis, en un mot, convinrent également de ce droit d'investigation sur la manière dont la justice était administrée.

" Qu'il me soit permis à ce propos de citer quelques phrases d'un ouvrage dont l'auteur mérite—comme écrivain, par son talens; comme citoyen, par ses principes; comme député, par son courage—toute notre estime et tout notre respect. Je veux parler de celui qui le premier a proféré à la tribune d'énergiques paroles contre des horreurs alors encore à demivoilées, et dont l'indignation vertueuse les a reprimées par le seul effet d'une publicité salutaire. A ces traits vous reconnaissez, messieurs, je n'en puis douter, M. Camille Jordan.

" 'Voudrait-on élever,' dit-il, 'à l'effusion du sang innocent, commise par le glaive égaré des lois, la seule compensation que la Providence semble avoir ici-bas ménagée pour le plus grand de malheurs, celle de concourir par les souvenirs mêmes qu'elle laisse, à l'amélioration des formes et au soulagement des générations futures? Quoi! parcequ'une terrible méprise aurait eu lieu, il faudrait, pour l'honneur de quelques juges, en rendre le renouvellement perpétuel? Elles devraient se fermer à jamais, ces pages lugubres qui présentent au législateur consterné les plus utiles instructions pour la patrie, et pour l'humanité toute entière! Voyez,' continue-t-il, 'l'état des contrées où tout examen de la justice est, comme on le demande, sévèrement interdit. Alors, en Angleterre, sous le voile d'un silence prétendu religieux, furent enveloppés les arrêts de la Chambre Etoilée, les persécutions judiciaires de Marie, les

cruautés légales de Jeffries et de Kirk. Alors en France, il fallut s'incliner et se taire de toutes ces commissions extraordinaires qui ont souillé de tant de procédés iniques les annales de notre justice criminelle.'

"Ainsi, messieurs, dans tous les pays, les hommes honnêtes, les grands et bons citoyens, les défenseurs de nos libertés et de nos droits, s'entendent et se répondent. Heureuse sympathie, qui met en défaut les sourds manœuvres des ennemis du bien, et qui couvre de sa voix puissante les vains murmures des factions vaincues aussitôt que démarquées."

The eloquent author whose words we are here quoting, then enters upon a dissertation as to the merits of Sir Samuel Romilly as a member of Parliament, and his conduct generally as a public man; but it is thought that sufficient has been presented to enable our readers to judge of the character of this impassioned address; and we therefore content ourselves with adding the concluding passages of it:—

"Vous demeurez persuadés, je le pense, que la mort de Sir Samuel Romilly est, non seulement pour l'Angleterre, mais pour l'humanité, une fatalité cruelle. Il réunissait deux choses, trop rarement combinées,—la science pratique et la philosophie spéculative; la science pratique qui rend la spéculation applicable, et la philosophie qui rend la pratique juste et éclairée. Il voulait la liberté, et, comme tous ceux qui veulent sincèrement la liberté, il ne voulait pas le désordre; il voulait partir de ce qu'existait, pour améliorer et non pour détruire; il voulait éclairer l'autorité, la restreindre dans ses bornes légitimes, non la renverser, la concilier avec les droits de tous, et par là lui donner plus de durée; préserver les gouvernemens du despotisme qui perd la puissance, les peuples de l'anarchie qui perd la liberté. Sa carrière était déplorablement interrompue; mais ses travaux, sa gloire, son exemple nous restent. Plus d'un malheureux, épargné par des lois qu'il a adoucies, plus d'un opprimé, garanti par les principes qu'il a proclamés, plus d'une nation peut-être, invoquant sa mémoire illustre contre les abus de la force, les manœuvres de la perfidie, ou l'insolence d'une victoire éphémère, serviront long-temps encore à faire chérir, à faire respecter, à faire bénir son nom.

"Au reste, messieurs, en mettant à part la cause douloureuse et le genre déplorable de sa mort, vous trouverez peut-être que ce n'est pas lui qu'il faut plaindre. La carrière des défenseurs de la liberté est rude et laborieuse. Ils rencontrent sans cesse la destinée qui trompe leurs espérances, et des calamités imprévues qui dévastent les champs qu'ils cultivent. Tantôt des crimes, plus souvent des erreurs, quelquefois tout-à-coup la peur ou l'ignorance, les repoussent du but dont ils approchaient. Ne sont-ils pas heureux de se réposer dans la tombe, après avoir fait quelque bien?

"Que ceux qui vivent cependant n'oublient pas que leur devoir est tracé. Ils ont reçu du ciel une mission difficile, mais ils en sont responsables. Même en succombant, ils obtiennent l'approbation de tout ce qu'il y a de vertueux sur la terre. Ils plaident une noble cause en présence du monde, et secondé par tous ses vœux; qu'ils ne se découragent donc pas: aucun siècle ne sera tellement déshérité, qu'il présente le genre humain tout entier tel qu'il le faudrait pour le despotisme. L'avenir ne trahira point l'espèce humaine; il restera toujours de ces hommes pour qui la justice est une passion, la défense du faible un besoin. La nature a voulu cette succession: nul n'a jamais pu l'interrompre, nul ne l'interrompra jamais; et si beaucoup meurent à la peine, beaucoup d'autres viendront après eux qui recueilleront leur mandat, et qui poursuivront leur ouvrage."

Art II.—ON THE THEORY OF IMPLIED CONTRACTS.

THE object of the present article is to ascertain what, in the technical language of English law, is meant by the expression "implied promise," or "promise in law," and to show that in the great majority of cases these expressions do not denote a genuine, but a fictitious promise. The writer has also endeavoured to set forth the reasons which gave rise to the fiction in question, and also to the fiction of implied requests,

which is inseparable from it. In order to render what follows more clear and intelligible, it is proposed in the first place, to draw the attention of the reader to the true nature of a genuine agreement.

1. Agreements.

An *agreement* is the mutual and deliberate consent of several persons, that something shall be done or forborne. If the agreement arises from a deliberate offer by one party, and a simple acceptance thereof by another party, the agreement is termed a *promise*, and its effect is to impose an obligation on the offerer (called the promisor), and a right correlative thereto on the acceptor (called the promisee). If the agreement consists of mutual promises, *i. e.* of offers made by each party and accepted by the other, the agreement is termed a *pact* or *convention*, or simply an *agreement*, and its effect is to impose obligations on each promisor, with correlative rights on each promisee.

By a *contract* is meant, an agreement which is recognised as binding in a juridical, as opposed to a moral or religious point of view. A contract, therefore, like an agreement, may consist of one promise or of several mutual promises; but in every case the effect of a contract is the creation of one or more obligations, enforceable actively or passively in a court of civil jurisdiction.

The binding power of an agreement is entirely dependent on the consent of the parties to it; not only, be it observed, on the consent of one of the parties, but on the mutual consent of both; viz. of the person making the proffer and of the person accepting it. An unaccepted proffer (*pollicitation*), imposes no obligation on the party making it, either in a moral or a juridical point of view. The reason of this is sufficiently obvious; agreements are held obligatory, in consequence of the manifest injustice in disappointing expectations deliberately raised; but if an offer be not accepted, no expectation can be regarded as raised, and no injustice is committed if the offer be not carried into execution. Hence in all systems of jurisprudence, it is held that an unaccepted offer may be retracted, and any exceptions to this rule are universally considered anomalous.[1] *Con-*

[1] Pothier, Oblig. No. 4; 1 Molitor des Oblig. en Droit Rom. p. 88, 252

sent is the essence of every agreement, and is formed of the intention signified by the promisor, and of the corresponding expectation signified by the promisee. This intention with this expectation is styled the *consensus* of the parties; because the intention and expectation chime or go together, or because they are directed to a common object; namely, the acts or forbearances which form the object of the agreement.[1] Consent is in jurisprudence as essential to every contract as it is in morals to every agreement, and consequently there cannot be any contract in the proper sense of the term, where the promisor or promisee is, juridically speaking, incapable of giving consent, or being capable and consenting, does not signify his consent in the manner required by law.

2. Contracts Express and Implied (in the sense of Tacit).

According as the consent of the parties to a contract is signified directly by some expression of will, or indirectly so that it can only be gathered from attendant circumstances, is the contract said to be *express* or *tacit*. This division of contracts has reference entirely to the mode of proof, and not to any difference in the nature of agreements. A tacit agreement is as much a genuine agreement, as one which is expressed. Consent, in the sense already explained, is as essential to the one as to the other; and such consent being present and signified, the agreement is complete. This is illustrated by Mr. Austin,[2] with with his usual clearness and accuracy: he says:—"The promisor signifies to the promisee, that he intends to do the acts, or to observe the forbearances, which form the object of his promise. If he signifies this his intention by spoken or written words (or by signs which custom or usage has rendered equivalent to words), his proffered promise is *express*. If he signifies this his intention by signs of another nature, his proffered promise is still a genuine promise, but is *implied* or *tacit*. If, for ex-

Grot. de Bell. et Pac. ii. c. 11, § 16; Puchta Pandekten, § 251, 259; Thibaut, System, § 570; Payne *v.* Cave, 3 T. R. 148; Routledge *v.* Grant, 4 Bing. 653.

[1] See Austin's Prov. of Jur. 359, note.

[2] See Austin, ubi sup. 356, 357.

ample, I receive goods from a shopkeeper, telling him that I mean to pay for them, I promise expressly to pay for the goods which I receive; for I signify an intention to pay for them, through spoken or written language. Again: having been accustomed to receive goods from the shoopkeeper, and also to pay for the goods which I have been accustomed to receive, I receive goods which the shopkeeper delivers at my house, without signifying by words spoken or written (or by signs which custom or usage has rendered equivalent to words), any intention or purpose of paying for the goods which he delivers. Consequently I do not promise expressly to pay for the particular goods. I promise, however, tacitly; for by receiving the particular goods, under the various circnmstances which have preceded and accompany the reception, I signify to the party who delivers them, my intention of paying for the goods, as decidedly as I should signify it if I told him that I meant to pay. The only difference between the express, and the tacit or implied promise, lies in the natures of the signs through which the two intentions are respectively signified or evinced."

Instances of genuine implied contracts exist, of course, in abundance. The following suffice for the purpose of illustration. The drawer of a bill of exchange impliedly promises to pay it if the drawee does not.[1] Where an express contract has been made for the sale of goods, and goods are sent not according to the contract, a promise to pay for them *quantum valent* is implied, if they are retained.[2] So, where an express contract is entered into, but is invalid, a promise to pay for what has been actually done on the faith of it is properly implied.[3] Where a person receives goods under a bill of lading, and retains them, a promise on his part to pay what may be due for their freight is implied.[4] If a lessee, with the consent of his landlord, remains in possession after the expiration of the lease, a contract for a tenancy from year to year, upon the terms of the lease, so far as they are applicable to

[1] Starke *v.* Cheeseman, 1 Ld. Raym. 538.
[2] Hart *v.* Mills, 15 M. & W. 85.
[3] Manor *v.* Pyne, 3 Bing. 285.
[4] Dougal *v.* Kemble, 1 Bing. 383.

such a tenancy, is implied between the tenant and the landlord.[1]

In all these cases a genuine consent is present, and is, in fact, signified, though not by express words. This consent, moreover, is no fictitious consent imputed by law, in spite of its non-existence in point of fact, as may be seen at once by supposing dissent to be signified. If I request a person to work for me, but say nothing as to payment, I tacitly agree to pay him for his services, and of course a mere mental reservation or unsignified intention on my part not to pay for them cannot affect the question. My conduct, so far as it can be taken into account by another, reasonably leads to an expectation of payment, and I am not at liberty to defeat the expectation so reasonably raised by myself. *De non existentibus et non apparentibus eadem est ratio.* But if there are circumstances apparent, and rebutting the inference of any intention on my part to pay, as if the person were accustomed to work for me for nothing,—or if I stated, when I requested him to work, that he must not expect to be paid, no intention to pay is imputed to me by a *præsumptio juris et de jure*, and no contract is implied by law against the real facts of the case.[2] A tacit contract, in short, is not a fictitious but a genuine contract, which may be fairly inferred by a proper application of the rules of evidence. There may even be a genuine implied (*i. e.* tacit) contract, although dissent be expressed, if, notwithstanding such dissent, the whole evidence, when taken together, warrants an inference of assent. Thus, where a person, wishing to send fish by a railway, was told by a notice served upon him that fish would only be carried on certain terms, and he objected to those terms, but nevertheless sent the fish, the jury were held properly to have found that he had in fact agreed to send his fish upon the terms of the notice.[3] It is to be observed that the fish were not accepted upon his terms, or upon any terms other than

[1] Doe *v.* Amey, 12 A. & E. 46.

[2] See Moffatt *v.* Laurie, 15 C. B. 583. Jewry *v.* Buck, 5 Taunt. 302, was a case of this description, and one in which, in spite of Lord Mansfield, the jury clearly drew a wrong inference.

[3] Walker *v.* The York and North Midland Railway Company, 2 E. & B. 750.

those mentioned in the notice; and although he objected to those terms, the sending of the fish could only be looked upon as a waiver of his objections: *Protestatio facto contraria non valet.*

The above observations are, it is hoped, sufficient to show that whether a genuine contract exists or not is a mixed question of law and fact, but that whether a contract is express or implied (*i. e.* tacit) is a pure question of fact, and depends entirely on the evidence by which the existence of the contract is proved. As the division of contracts into written and unwritten is a division founded only on their mode of proof, and does not turn on any difference in the nature of that consent, which is the basis of all agreements, so the division of contracts into express and implied (in the sense of tacit) has no reference to that consent, but solely to the evidence by which its existence is shown. It may, in truth, be said that the division into express and implied (in the sense of tacit) is not applicable to contracts at all, but only to the facts by which they are evidenced, and tallies, therefore, with the division of evidence into direct and indirect.

3. Of Fictitious Promises, or Promises in Law.

We pass now to a wholly different source of obligations, and proceed to consider the nature of what are called obligations arising *quasi ex contractu.*

Quasi contracts (which, together with genuine tacit contracts, are usually called by English writers *implied* contracts) are not agreements at all. The consent, without which no agreement can possibly exist, is in those transactions called *quasi* contracts wholly absent. Nevertheless, as will be hereafter shown, consent has been considered in our jurisprudence as essential, and has consequently been imputed by a fiction.

The term *quasi* contract has been adopted from the Institutes of Justinian. Speaking of obligations, it is laid down: *Sequens divisio in quatuor species deducitur: aut enim ex contractu, aut quasi ex contractu; aut ex maleficio, aut quasi ex maleficio.*"[1] Then, in

[1] Inst. iii. tit. 13, l. 2.

another place, we find the nature of *quasi* contracts determined thus: "*Post genera contractuum enumerata, despiciamus etiam de iis obligationibus quæ* NON *proprie quidem* EX CONTRACTU *nasci intelliguntur, sed tamen* QUIA NON EX MALEFICIO *substantiam capiunt,* QUASI EX CONTRACTU *nasci videntur.*"[1] From this it appears that a *quasi* contract is an event giving rise to an obligation, and is characterized negatively; first, by not possessing the essentials of a contract; and, second, by not being unpermitted, and so falling within the class of *maleficia.* By the old Roman law, contracts and torts were regarded as the primary sources of obligations. Subsequently, other sources were also admitted, although they were neither contracts nor torts. Gaius[2] says, "*Obligationes aut ex contractu nascuntur aut ex maleficio, aut proprio quodam jure ex variis causarum figuris.*" It is these last which are divided by Justinian into *quasi* contracts and *quasi* torts. Both are distinguished from genuine contracts and genuine torts by the absence of those characteristics which are essential to such contracts and torts respectively; and each is further distinguished from the other by being—the first an event not unlawful, the second an event unlawful.

M. Ortolan, in his excellent commentary on the Institutes, writes: "The event which occasions an obligation, *quasi ex contractu,* contains no agreement; there is no mutual accord between the parties, by virtue of which the obligation arises, and no contract in any sense can be said to exist. On the other hand, the event is one not juridically unpermitted, and cannot therefore be termed a tort or a *quasi* tort."[3] The legal obligation *quasi ex contractu* arises from the flagrant moral injustice which would otherwise be allowed to be committed with impunity; it arises *ex re,* by the force of circumstances, *utilitatis, æquitatis causâ.*[4] Hence it is that persons who are altogether incapable of contracting, may, nevertheless, be obliged *quasi ex contractu;* and this shows conclusively the absurdity of

[1] Inst. iii. tit. 27.
[2] Dig. xliv. tit. 7, de O. et A. l. 1, pr.
[3] 2 Ortolan Explic. des Instit. lib. iii. tit. 27.
[4] See Dig. xliv. tit. 7, de O. et A. l. 5, and 1 Molitor des Oblig. en Droit Rom. § 7.

the theory that consent, express or implied, is essential to such an obligation. To say that a person has no sufficient will to bind himself *ex contractu*, and yet that the same person can only be held bound *quasi ex contractu* by virtue of a presumed exercise of will, is to utter in the same breath two wholly inconsistent propositions. And yet we find writers, both foreign and English, treating *quasi* contracts as permitted transactions, which give rise to obligations by virtue of a presumed consent. Having shown that such a theory is not warranted by the *corpus juris*, and that any consent in the class of cases now under discussion has no existence in point of fact, but is purely fictitious, we shall endeavour to discover the reasons which have led to the adoption of the fiction in our own system of jurisprudence.

Previously to the Statute of Westminster 2, the only common forms of action,[1] by which a right *in personam* could be enforced, were *covenant*, *debt*, *detinue*, and *trespass*. Of these, trespass was an action *ex delicto*, which did not in any case lie for a nonfeasance, or even for a misfeasance, unless done *vi et armis*. Debt only lay to recover a liquidated sum of money, and not damages for a breach of contract or other cause. Detinue lay for the recovery of a certain specific chattel, detained in breach of good faith, but was not applicable to anything else; and covenant only lay in case of a breach of a contract formally embodied in a deed. The Statute of Westminster 2, c. 24,[2] introduced another class of actions *in personam*, called generically actions on the case, and characterized rather by negative than by positive features. No one of them was *covenant*, or *debt*, or *detinue*, or *trespass*, and each of them was originally unlike any other of them, inasmuch as the writ upon which each was founded was framed with special reference to the circumstances peculiar to the occasion which led the applicant to seek redress. The Masters in Chancery had, by the terms of the statute, ample power to frame new writs upon the model of any of the writs previously established, and so to extend any of the old

[1] The writs of account, annuity, conspiracy, and deceipt, and the writs of assize, &c., may be left out of consideration, without affecting the general accuracy of the statements in the text.

[2] See it in 2 Inst. 404.

actions to cases more or less like those to which they had been strictly confined. This power was not, however, exercised to its full extent; for during the first century after the passing of the Act the new actions appear seldom to have been brought; and in nearly all of those which are to be met with in the books the writs were framed in *tort* on the model of the writ of trespass *vi et armis*.[1] Not guilty was the general issue,[2] and *trespass* on the case was the general name of the class.[3] In the reign of Henry IV., actions on the case became common, and it is in his reign that we first find traces of actions of assumpsit as a distinct sub-class of actions on the case. Actions founded on the non-performance of an express contract, not under seal, were by no means favoured by the judges of those times.[4] On two occasions actions were brought, in which the declaration alleged a promise (*Quare cum, &c., assumpsisset, &c.*) and a breach; but the judges set their faces against the attempt, and decided that the defendant, having been guilty of no misfeasance or malfeasance, was not liable at all.[5] This naturally drove persons aggrieved by the non-performance of a deliberate promise into the Court of Chancery,[6] a course which seems to have induced the Common Law Judges to take a somewhat more liberal view of the cases subsequently brought before them. The growing spirit of liberality can be distinctly traced in the decisions pronounced during the reigns of Henry VI. and Edward IV., and brought together by Mr. Reeve in his History of English Law;[7] and in the reign of Henry VII. it was finally settled that an action on the case for the non-performance of a promise would lie.[8] The modern action of assumpsit was thus at length introduced. There is, however, no trace as yet of an action of assumpsit based upon a fictitious contract.[9] Such an innovation could not be expected to be made without

[1] See 3 Reeve, Hist. 89; Bro. Ab. Accion sur le Case.

[2] Ebrington *v.* Doshant, 1 Lev. 142.

[3] A century has not yet elapsed since actions on promises were commonly called actions on the Case. See Vigers *v.* Aldrich, 4 Burr. 2483; Jacques *v.* Withy, 1 D. & E. 557.

[4] See Bro. Ab. Accion sur le case, and the cases referred to in 1 Ashe's Promptuary, p. 11, § 12.

[5] 3 Reeves, Hist. Eng. Law, 245.

[6] 1 Spence, Eq. Jur. 243.

[7] 3 Reeve, 394.

[8] 4 Reeve, 171.

[9] 3 Reeve, 396.

opposition, or in the absence of the most urgent necessity. The necessity is obvious, for the reader will have no difficulty in imagining cases where a remedy ought certainly to exist, and where, nevertheless, no satisfactory remedy was provided by any of the original writs upon which actions at law were based.

Take, for example, the case of money paid by mistake in satisfaction of a debt erroneously supposed to be due. The money paid ought clearly to be returned, but the means by which its return could be compelled were by no means obvious or satisfactory. Covenant was out of the question; trespass equally so; trover or detinue would not lie, inasmuch as the ownership in the particular coins paid had been transferred; account was doubtful and tedious; debt presupposed a contract,[1] and even if it lay, the plaintiff was liable to be defeated by an unscrupulous wager of law, or by a mistake as to the amount which ought to be returned.[2] An action on the case for a nonfeasance, in other words, an action of assumpsit, was the only satisfactory form of action left. But that had not as yet been sustained, except where there was an actual agreement between the parties. In the case supposed, there is no agreement whatever for the return of the money; assumpsit, therefore, would not lie, and there was no remedy unless by a subpœna out of Chancery. In this difficulty, a promise to return the money was imputed by a fiction,[3] and by means of this fiction the remedy by assumpsit was made available. The fictitious promise was called a *promise in law,* an *implied* promise. A denial by the defendant that he made any promise in point of fact, was wholly useless; he ought to return the money, and the fiction was necessary as a means whereby to compel him so to do. The great advantages which an action of assumpsit had over the action of debt, as well as over every other form of action on the case, and the small departure from established forms which the above fiction rendered necessary, are sufficient to account for its origin and subsequent rapid extension.

[1] See the argument on Harris *v.* De Bevoice, 2 Ro. Rep. 440.

[2] 3 Bl. Com. 155.

[3] A similar fiction, "*making a privity,*" was applied to actions of account, and thence to actions of debt. See Finlason's Lead. Cases on Pleading, 79; Core's Ca. Dyer, 20 *a.*

The fiction being established, it became customary to talk of express contracts, and contracts implied by law, and to divide contracts into express and implied—a division which, in the sense in which the word *implied* is used, is inadmissible, if the word contract is to retain any definite signification. The fictitious nature of implied promises was clearly seen by Lord Holt. In Starke *v.* Cheeseman, 1 Lord Raymond, 538, he is reported to have said: "The notion of promises in law is a metaphysical notion, for the law makes no promise but where there is a promise of the party;" and in Anon. 6 Mod. 131, he says, "There is no such thing as a promise in law." The meaning of this is, that a promise in law, also called an implied promise, is not a genuine promise at all. The circumstances which, as the phrase goes, raise a promise in law, are indefinite in number, and cannot be said to have more characters in common than these; namely,—first, the negative one of absence of any genuine agreement, express or tacit; and, second, the positive one of being such as on the plainest principles of morality give rise to an obligation which, in the opinion of Common Law Judges, ought to be enforceable at law, but which, nevertheless, cannot be properly enforced except by means of an action in form *ex contractu*. According to Blackstone, contracts *implied* by law are "such as reason and justice dictate, and which, *therefore*, the law presumes that every man has contracted to perform."[1] This passage, it must be admitted, is very unsatisfactory. Justice and reason dictate no contract in any case whatever; such agreements as people choose to make are recognised, and are "in justice and reason" to be upheld or condemned, according to their nature, and the circumstances under which they were made; but where there is, in fact, no genuine agreement, either express or tacit, no *fictitious agreement* is dictated, either by justice or by reason. Unsatisfactory, however, as the passage is, we have thence authority for saying, that it is impossible accurately to determine, by definition, the limits of the class of cases in which a fictitious promise has been or will be imputed.

[1] 3 Bl. Com. 159; Ib. 162; and Comyn, Contr. 4.

4. Of Implied Requests.

The theory of implied requests is, in part, precisely similar to that of implied promises, both as regards its origin and the purposes for which it was invented. In order to enforce certain clear moral obligations, arising in the absence of any genuine agreement, whether express or tacit, a promise to perform them was, as we have seen, imputed by a fiction. To make this fiction of use in those cases where that which was regarded as the consideration for the fictitious promise was past and executed, it was further necessary, if there had been in fact no express or tacit request on the part of the obligor, to suppose that what had been done by the obligee had been done at the request of the former, to whom the promise was imputed. It is, in general, both morally and otherwise, very just and reasonable that a person shall not be permitted unasked to do another a kindness, and then make him pay for it.[1] As a rule, no person is bound to pay for a benefit which he never sought to obtain. On the other hand, morally it is very unjust, although in this country it has long been held legally just, that an express promise to pay for an unsought benefit actually received should be deemed invalid.[2] There are, however, cases where a person is manifestly entitled to compensation for what he has done, although he did not do it at the request, express or tacit, of the person who ought to make the compensation. Thus, if one of two sureties pays the whole of a debt guaranteed by both, he clearly ought to be indemnified by the other to the extent of one-half of the debt paid. A fictitious promise to indemnify would not alone be sufficient; for the consideration for it is wholly past, and the person paying (we will suppose) neither became surety, nor paid the debt at the request, express or tacit, of his co-surety. To remedy this objection, a fictitious request is imputed, and then the fictitious request, together with the payment, supports the fictitious promise to indemnify. This promise, in its turn,

[1] Hunt *v.* Bate, Dyer, 272 *a*; Galway *v.* Mathew, 10 East, 264; Stokes *v.* Lewis, 1 T. R. 20; Child *v.* Morley, 8 T. R. 610.
[2] Hunt *v.* Bate, Dyer, 272 *a*; Bull. N. P. 147 *a*.

serves as a foundation for a declaration in assumpsit; and so justice is done.[1]

Cases are also to be found where a fictitious request has been imputed, in order to support an *express* promise. An express promise to pay for a benefit unsought, but actually obtained, has been held invalid for want of a proper consideration. This monstrous doctrine, however, has been softened down, by supposing the express promise to be evidence of a request preceding the benefit obtained.[2] This is manifestly not a legitimate inference. An express promise to pay for what has been done, is evidence of an intention to confer a right on the promisee to require such payment, but is clearly no evidence whatever that the promisor *previously* requested the doing of what he has undertaken to pay for. Previously to the promise, the promisor may have done nothing whatever to raise an expectation of payment, and it is absurd to say that from the promise anything like a prior request can be legitimately inferred. The doctrine relating to executed considerations, renders a fictitious request as necessary where the promise is genuine, as where it is itself fictitious. Speaking generally, the modern cases show that where there is an express promise, and the only consideration for it is past and executed, that express promise is invalid, unless there was in fact a previous request. Such is the general rule; and a rule more fitted to favour gross breaches of faith, can hardly be conceived. The doctrine, however, is fortunately not without exception, for there are cases where, in order to raise an obligation on the part of the promisor, a previous request by him will be imputed by a fiction;[3] and there are others, as in the case of a promise to pay a barred debt, where the promise is held binding in the absence of any such fiction. It would seem that there is only one class of cases in which a request will be imputed solely to support an express promise; viz. cases like Wing *v.* Mill, 1 B. & A. 104, where the plaintiff of his own accord did that which the defendant was legally compellable to do, and the defendant afterwards, in considera-

[1] Cowell *v.* Edwards, 2 Bos. & P. 268.
[2] See 1 Wms. Saund. 264 *b.*
[3] See Chitty on Contracts, 4th ed. p. 62.

tion thereof, promised to pay. All the other cases in which a request is imputed, will, on examination, be found to turn, not on the absence or presence of a genuine promise, but on the existence or non-existence of circumstances from which a promise will be imputed. If the circumstances are such that a promise would be imputed, then, if necessary, a previous request will likewise be imputed. For example, where the plaintiff has been compelled to do that which the defendant ought legally himself to have done; or where the defendant has adopted and received the benefit of what the plaintiff, without being requested, did for him. In all such cases, whether there be a genuine promise to pay or not, is immaterial. The genuine promise, even if there be one, goes for nothing: in other words, "where an executed consideration is one from which the law will imply a promise, no express promise made in respect of that consideration can be enforced, if it differ from the promise which the law would imply from the same consideration."[1]

From what has preceded, it appears that the expression implied promise, means sometimes a genuine but tacit promise, and sometimes, and more often, a promise which is wholly fictitious; and that this last meaning is that which also attaches to the expression promise in law. The reasons which gave rise to and have preserved these fictitious promises, have been traced to the disinclination of the Common Law Judges to depart from the old established forms of pleading. The doctrine of implied requests, which is so closely connected with that of implied promises, has been traced to the necessity of escaping from the cruel consequences of a logical application of the rule which does not allow a permitted act, past and gone, to give rise to an obligation on the part of one who did not request its performance, or even to be sufficient to support a subsequent express promise by him. To say that, under such and such circumstances, the law implies a promise, is, it is submitted, neither more nor less than equivalent to saying that the circumstances supposed give rise to an obligation to compensate, and that such obligation can be enforced at law by an action in

[1] Smith on Contracts, 119, 2nd ed.; Chitty on Contracts, 63, 4th ed. See, too, 1 Wms. Saund. 264 *a*, note *a*.

form *ex contractu.* What those circumstances are it is not necessary now to examine. There is one question,[1] however, which forces itself upon the attention, and which ought perhaps to be answered in this place, viz., what is the distinction between an obligation which gives rise to what is called an implied promise, and any other obligation which does not arise either from a genuine contract or from a tort? Without discussing this question at length, the writer ventures to submit that there is essentially none at all, unless it happen, as in some cases it may, that one is relative and the other absolute.[2]

N. L.

Art. III.—THE ECCLESIASTICAL COURTS IN IRELAND.

1. Talbot *v.* Talbot.—A Statement of Facts. By Thomas Tertius Paget, Esq.
2. Ecclesiastical Courts.—A Report of the Judgment of Dr. Radcliffe in the case of Talbot *v.* Talbot. By John Paget, Esq., Barrister-at-Law.
3. Talbot *v.* Talbot.—A Report of the Speech of Wm. Keogh, Esq., M.P., Solicitor-General for Ireland.
4. A Letter to the Hon. Justice Torrens. By John Paget, Esq., Barrister-at-Law; with a Report of the Judgment of the High Court of Delegates, delivered on June 14, 1855.
5. A Letter to the Lord-Lieutenant of Ireland, on the case of Talbot *v.* Talbot. By Thomas Tertius Paget, Esq.

THE force of the trite old saying, that truth is stranger than fiction, was never more strikingly exemplified than in the pamphlets, the titles of which we have placed at the head of this article. The incidents of this romance of real life are

[1] Raised in Govett *v.* Radnidge, 3 East, 70; Smith *v.* White, 6 Bing. N. C. 218; Pozzi *v.* Shipton, 8 A. & E. 963; and Brown *v.* Boorman, in error, 11 Cl. & Fin. 1. On this subject, see an article in 1 Law Mag. N. S. 192.

[2] In some states of America *assumpsit* lies for taxes, 20 Amer. Jur. 6. So in our own country an action in form *ex contractu* lies for money payable by Act of Parliament, or a bye-law. Com. Dig. action. *assumpsit*, A. 1.

so marvellous, that were they not the subject of grave investigation in a Court of Justice, we should at once dismiss them as incredible. The scene is a castle in the wildest of Irish wildernesses; the actors are drawn from the highest and the lowest ranks of life; crimes of the blackest dye are dimly shadowed forth as in the scenes of a melodrama; the gaol and the madhouse afford their quota of interest to the story; and the heroine is either the purest and the most injured, or the foulest and the most degraded of women. We shall not debate this question. We leave the arena free to the champions who have entered it. The decision of the question, whether Mrs. Talbot is the most abandoned of wives, or Mr. Talbot the most unnatural of husbands, is for another tribunal. The learned Lords who adjudicate on Divorce Bills will, we presume, have to decide that question, before the session which has just opened shall have reached its close; and we shall confine ourselves to the shortest possible statement of a few of the leading facts of the case Talbot *v.* Talbot, as they appear in the evidence of the witnesses and the judgment of the Court.

Mr. Talbot alleges that in the month of May, 1852, he for the first time discovered that his wife, whom he supposed to be the chastest and most virtuous of women, had been for two years carrying on an intrigue under his own roof with a groom in his service, of the name of Mullane. The occasion of the discovery was alleged to be the detection of Mrs. Talbot in this man's room, and it was also stated that upon such detection Mrs. Talbot admitted her guilt. So far there is nothing very startling in the story, except the alleged blindness of the husband. Mrs. Talbot had undoubtedly borne the most irreproachable of characters, and neither her friends, neighbours, or servants had ever suspected anything wrong; but the tale of low and licentious passion is unhappily as old as the world itself, and unless human nature undergoes some wonderful change, will probably last as long.

Mr. Talbot goes at once to Dublin, and takes immediate steps to inform Mrs. Talbot's family of her guilt, and to obtain a divorce.

Here the extraordinary part of the history commences.

Mrs. Talbot's friends appear to have accepted the story of her guilt, without inquiry or investigation of any kind whatever, and to have been almost assenting parties to her removal by persons connected with her husband's attorney to some place of seclusion, without even ever seeing her, and without knowing either where or with whom she was placed, and which afterwards turns out to be situated in a suburb of Windsor (of course out of the jurisdiction of the Courts to which Mr. Talbot was applying), and to be the residence of a woman who passes under an *alias*, and in whose house it appears to be an undoubted fact Mrs. Talbot was confined under a feigned name, and without the slightest communication with any one of her friends for a period of nearly six months! It will be asked, was Mrs. Talbot herself passive whilst this was going on? Mrs. Talbot was and unhappily still is insane, and since her release from the custody to which we have alluded, has been under the care of two physicians, whose names are familiar to all our readers, Dr. Conolly and Dr. Roscoe, both of whom appear as witnesses in the case.

In the meantime Mr. Talbot was actively pressing on his divorce, and in a few days would have obtained a final sentence in his favour, when the suspicions of one member of the family were aroused by the extraordinary and mysterious seclusion of Mrs. Talbot, and the impediments which were opposed to his attempts to obtain any information as to where or with whom she was placed. This occurred in the month of August, 1852, and from that time the strange incidents which invest this story with the interest of a romance, gradually, painfully, and one by one, came to light. First it turned out that the alleged *discovery* took place in open day, in a room public to all the servants; that Mrs. Talbot's child, of nearly seven years of age, was with her at the time; and that there was every reason to believe that her motive for entering the room upon that occasion was to dry the child's feet, which had got wet whilst she was playing in the farm-yard, adjoining to which the room was situate. The next fact that came to light was indeed a startling one. It appeared—and we should not venture to make this statement, were not the fact deposed to by Mr. Talbot's own witnesses, admitted by Mr. Talbot's own counsel, and

referred to as proved by the learned Judges who have decided the case in Mr. Talbot's favour—that Mr. Talbot, immediately upon the alleged discovery, about the middle of the day, on the 19th of May, 1852, consigned his wife to the care of two men, one of whom was his butler, a man named Halloran, with orders to take her to her bedroom and to lock her up there; that in the dead of the night, which Mrs. Talbot passed in passionate entreaties to be permitted to see her husband, and protestations of her innocence, Halloran entered her room and offered violence to her person! Such an incident, occurring in our own day and in our own land, sends a thrill of horror through every nerve, and makes the blood curdle! But this was not the only indignity to which Mrs. Talbot was subjected during that horrible night, for Finnerty (the other servant in whose charge she was placed by her husband) brought the groom, with whom his mistress was charged to have had guilty intercourse, back to the house from which he had been dismissed, placed him in his mistress's bedchamber, and left him there in a state of intoxication! These men are retained by Mr. Talbot in his service, and the wages of Halloran are raised after Mr. Talbot was made acquainted with the facts. The next step was the discovery that Halloran had entered Mr. Talbot's service, in which he had only been a few weeks, fresh from gaol, where he had been confined for forgery, and that his character was such as might reasonably be suspected from such antecedents.

The discovery of these facts, as may be supposed, neither quieted the suspicions of Mrs. Talbot's friends, nor diminished the eagerness with which they prosecuted their inquiries; and their next step, as we gather from the long and somewhat involved narrative from which we are compelled to extract the facts, was to rescue Mrs. Talbot herself from the confinement in which she had been placed, which, after some difficulty, was accomplished. She was immediately placed, as we have before stated, under the care of Dr. Conolly and Dr. Roscoe, and upon their investigation of her state of mind, it appeared that what had been quoted and relied upon as admissions of guilt, were more properly to be considered as the ravings of insanity

and the wanderings of delusion,—such, at least, is the testimony of these two physicians. Mrs. Talbot was immediately removed to the residence of Mr. Paget, her brother-in-law, in Leicestershire; and her defence was taken up with a degree of vigour and determination which has resulted in a suit unprecedented for length, for expense, for varied incident, and for apt illustration of the extremely unsatisfactory state in which our Law of Divorce, notwithstanding the universal condemnation it has received on all sides, still remains. Be the merits of the individual case what they may, it affords examples of almost every kind of inconsistent and even contradictory defect and impediment which can arise in the course of a judicial investigation.

It is strange that a proceeding so repugnant to common sense and the first principles of justice as the action of Crim. Con. should still remain a condition precedent to being released from a dissolute wife. That a husband should be permitted to put a money-value on what he is most anxious to get rid of, and to recover damages for an infringement of that bond which he is above all things desirous to sever, is an absurdity; but that he should be compelled to appraise his wife, to receive money for his shame, is a revolting outrage upon him; and that the character of a woman should be blasted, and her reputation destroyed, by a proceeding to which she is no party, and where she cannot be heard, is a monstrous injustice to her. Never have we met with a more striking instance of this than in the pages which are now under our eye. The scene opens with a judgment by default for 2,000*l.*, recorded against an absent groom by his master; whilst the unhappy lady, who is principally interested in the inquiry, is confined in a state of insanity, her friends know not where, and utterly unconscious of the whole proceeding!

The next step is a suit in the Ecclesiastical Court, where, still absent, still insane, her defence is intrusted to proctors introduced to the cause by her husband's attorney! Early in the case we meet with a striking example of the very mischiefs which were pointed out by Dr. Lushington as incident to the mode of taking evidence in the Ecclesiastical Courts, so long ago as the year 1844, in his evidence before a committee of the

House of Lords. Mr. John Paget, after a preliminary comparison of the mode of pleading in the Courts of Common Law and Equity with that of the Ecclesiastical Courts, proceeds as follows:—

"A suit for divorce by reason of adultery in the Ecclesiastical Courts partakes of the nature both of a criminal and a civil proceeding.

"The wife is on her trial for a crime, and so far as regards her the proceeding is criminal.

"The husband seeks redress for a wrong, and so far as regards him the proceeding is civil.

"The pleadings consist in the first place of the "libel," which is exhibited by the husband, or "promovent," as he is technically called.

"This is analagous to the indictment in a criminal or the declaration in a civil proceeding. It contains a statement of the complaint.

"This is met by a plea or 'defensive allegation,' which contains the counter-statement of the wife, who is technically designated as the 'impugnant.'

"If further facts have to be brought forward on either side, and the nature and circumstances of the case are such as to render it necessary, each party may state those further facts, and add to their original statements by pleading 'additional articles,' until the story is complete on both sides.

"We now come to what is the pith, marrow, and essence of every judicial inquiry, however conducted—the evidence. Each party produces his witnesses.

"Here the great and striking difference between the mode of procedure in the Ecclesiastical Courts and the Courts of Common Law commences.

"The proctor draws, or is supposed to draw, the article in support of which he produces a witness, from information furnished to him by that witness. The witness tells his story to the proctor. The proctor draws the article from the information so given, and then sends the witness in to prove it.

"This is the case where proctor and witness are both honest; but there is nothing whatever, except the subsequent penalties of perjury upon the witness if he is caught out, to prevent the process from being reversed, and the proctor from drawing the article to suit what he wants to prove, and then finding a witness to prove it.

"If the witness has a tolerable memory, and is sufficiently unscrupulous, he is pretty sure to prove any article he is designed to, for he goes direct from the proctor's or attorney's office to the examiner, who is an officer of the court; he sits with him in a private room, no eye to watch him, no ear to mark his faltering voice as he approaches the perjury he is about to commit; the article he is to prove is read over to him, and his deposition taken down, almost in the very words to which he has been drilled by the attorney or the proctor whose office he has just quitted.

"This machinery, ingeniously as it is adapted for ensuring and

protecting falsehood, sometimes fails. It occasionally happens that a witness shrinks from the actual commission of the crime he has undertaken, and speaks the truth he has promised to suppress; but this, as may well be supposed, is rare, and in general it may be assumed that a witness proves in chief the article to which he is designed.

"We now come to the cross-examination.

"Before a witness is produced, the proctor for the opposite party receives notice of the name of the witness, and the articles he is vouched to support, and he then prepares interrogatories to be administered to the witness. These interrogatories are reduced into writing, and given to the examiner, who cross-examines the witness from them; but they are not communicated to the party who produces the witness, nor does he know what questions have been put, or what answers have been given, unless the witness divulges them, which he is cautioned not to do, a caution which, it is presumed, he does not very often obey. The proctor or counsel who prepares the interrogatories does not know what the witness has deposed in chief; and, as the examination in chief and the cross-examination are both in secret, it follows that there is no re-examination.

"The evidence remains under the seal of official secrecy until it is completed on both sides; when that is the case, each party is entitled to know what has been sworn, and, as it is technically called, 'Publication passes.'

"A more perfect system of hocus-pocus, anything more like a duel with hatchets in a dark cellar, can hardly be imagined.

"If the ingenuity of man had been employed for the express purpose of inventing a scheme for the concealment of the truth, one more perfect could hardly have been devised.

"The evidence is given in secret. Not even the judge who has to decide upon it is present when the witness is examined. No one but the officer of the court, whose lips are sealed by his official duty, knows the manner, demeanour, or general behaviour of the witness whilst giving his evidence.

"Cross-examination, the sword of truth, is turned from steel to lead. All who have wielded that weapon know how powerless it is except in the swift thrust and parry of oral contest. It is only in the rapid movements of such a struggle that the joints of the armour of fraud open and admit its point.

"A cross-examination by written interrogatories, in secret, and where the evidence given in chief is unknown, must (except under circumstances of the most extraordinary good fortune) be a mere farce, a 'mockery, a delusion, and a snare.'[1]

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[1] Sir Anthony Hart says, speaking of the similar system which formerly prevailed in the Court of Chancery,—"As cross-examinations are at present, they are mere random hits in the dark. When I was very young at the Bar, I used to cross-examine, but I soon gave it up. For the last thirty years I hardly recommended it; I may say, I left it off as hopeless —I abandoned it in despair."—Per Sir Anthony Hart, Lord Chancellor of Ireland, in Booth *v.* Parks, 1 Molloy, 467.

"The mischief does not stop here; as has been observed, there is *no* re-examination. When the testimony given in chief and on cross-examination is unknown to the respective parties, it is impossible there should be. This is equally unjust to both parties. Every one knows how common the case is of a witness, even a perfectly honest one, whose testimony, if it terminated with the cross-examination, would prove anything but what the witness intended.

"The case is almost as common of the truth being in the possession of an unwilling witness; and this is the case which, above all others, requires skill on the part of the counsel who examines the witness.

"The party who calls him is not entitled to put leading questions, or to adopt any of those modes of examination which are necessary for the purpose of extorting truth from an unwilling witness, until the Court perceive, from the manner and answers of the witness, that he is adverse to the party who calls him. Even then it is always difficult, and frequently impossible, to extract the truth. When the examination in chief is concluded, the counsel on the other side finds, ready to his hand, a witness who is disposed to assist him, and has the additional advantage of being entitled to treat that witness as if he were adverse. In such a case the re-examination is the only check upon the witness, and generally the only mode of eliciting the truth.

"What chance would there be of extracting the truth from such a witness, on an examination in writing, in a private room, in secret, his evidence in chief and his cross-examination both concealed, and no re-examination?

"How much stronger the case, if the witness, in addition to being adverse, is unscrupulous or fraudulent!"

It must not be supposed that this is a solitary stricture on the evils incident to the system of examination which prevails in the Ecclesiastical Courts. Many others occur during the course of these proceedings. Our limits, however, preclude us from further following up the subject, and we must leave it, with an earnest recommendation to those to whom the reform of the Ecclesiastical Courts may be intrusted, to examine carefully the case of Talbot *v.* Talbot. We must devote our remaining space to a matter of more immediate and equally vital importance. The Pamphlets before us contain charges of so grave a nature, that whether Mr. Talbot proceeds to claim his divorce at the bar of the House of Lords, or not, it appears to us to be impossible that the case should be left to rest where it does. We express no opinion whatever upon those charges until we see the upshot of the case. It is, however, but fair to state, that the authors

of these pamphlets appear to feel the deepest conviction of the truth of their case—of the innocence of Mrs. Talbot, and of the charges against her being, to borrow the words which her brother, Mr. C. T. McCausland has used in giving his evidence, "the result of a foul conspiracy;" and that they by no means shrink from any responsibility which may fairly fall upon them. Mr. John Paget, in his examination of the judgment of Dr. Radcliffe, says:—

"As I have proceeded line by line through this case, I have felt the fearful issue that I was approaching. Dr. Gayer, the learned counsel, who appeared with the Attorney-General for Mr. Talbot, stated that issue in the following words: 'This is a case of truth and honour, and injured honesty on the part of my client, or a case of the vilest and deepest and most Satanic conspiracy that ever came within the walls of a court of justice." These are not my words, they are Dr. Gayer's: more terse, forcible, and appropriate than any I could have selected. With a feeling of the grave responsibility which rests on any one who permits his tongue or his pen to intermeddle where interests so high and so deep are at stake, I have carefully refrained from making any statements for which I have not been able to cite the passage in the evidence upon which I rely, and I have, as I believe, drawn no inference and used no argument without a similar citation, in order that it might be seen whether my observations rested on a solid or an infirm foundation."

Mr. T. T. Paget, addressing the Lord-Lieutenant, and commenting on the final judgment of the Court of Delegates, still more emphatically says:—

"The story I have to tell is strange and tragical. The charges I make are grave. I know well the responsibility under which I write, if that story is untrue.

"I charge judges with perversion of evidence,—with deliberately citing witnesses, as asserting what they expressly deny, and as saying what they have not said.

"With the rejection of evidence as manifestly perjured, and the subsequent reliance on that very testimony as evidence of truth.

"With the admission of hearsay evidence to prove a crime.

"With the deliberate suppression or negligent omission of a fact distinctly proved, the importance of which fact they subsequently admit.

"I say *deliberate*, because the argument upon the case, which occupied many days, terminated on the 19th of May. The Court, consisting of Mr. Justice Torrens, Mr. Justice Moore, Baron Greene, Sir Henry Meredyth, and Dr. Andrews, took nearly a month for consideration and for preparation of the judgment, which was delivered on the 14th of June; it passed subsequently under the eye of

the learned judge who delivered it, it received his final alteration and correction. He begins with the following words: 'In this important and painful case, it is my duty, as the senior member of this Court, to pronounce the judgment at which my brethren and myself have with unanimity arrived. In the discharge of that duty, IT IS RIGHT THAT THE REASONS WHICH INFLUENCE THE JUDGMENT OF THE COURT SHOULD BE PUBLICLY ANNOUNCED, and I have the satisfaction to state, that the GROUNDS OF THE JUDGMENT which I shall deliver have likewise received the unanimous concurrence of each of my brethren;' and in concluding his judgment, the same learned judge says emphatically: 'THIS COURT DOES NOT FOUND ITS JUDGMENT ON ANY OTHER GROUNDS THAN THOSE IT HAS ASSIGNED.'

"I am entitled, therefore, to look to that judgment for the 'REASONS' and the GROUNDS' on which my sister-in-law is condemned. If I make good the charges I have brought, the judges who delivered it are unfit to sit upon the bench. If those charges are unfounded, I incur and deserve the severest penalty of the law."

Mr. Paget then makes the following recapitulation of his charges against the Court:—

"I have now gone one by one through the charges I placed on record at the head of this letter. One by one I have proved them all. If I have misstated anything I can be convicted with the utmost ease. I refer, as proof of my accuracy, to the published judgment of the Court of Delegates, and to the evidence which remains on record in the Consistory Court.

"Inquiry is what I want; I court the most searching investigation. I write under a sense of the deepest responsibility. To deny that tribunals deserve the respect which ought to be their due—to arraign judges at the bar of public opinion, is a task not lightly to be undertaken. If the charges I have made are unfounded, they recoil with double force on my own head. I have thrown down the gauntlet in a contest in which one or other of the combatants must be covered with obloquy and disgrace.

"Six months have elapsed since the judgment of the Court of Delegates was delivered. Immediately upon that judgment being delivered, the attention of the Court was called to the errors it contained by my brother, in a letter to the Hon. Justice Torrens, the senior member of the Court.

"That letter was immediately transmitted to each member of the Court; it has been before the public for five months; it has been the subject of discussion and comment in six leading daily and weekly London papers, and also in the papers of Dublin and Belfast, and many of the principal provincial towns in England and Ireland. As far as I am aware, no attempt has been made to deny, or even to question, the accuracy of any statement it contained.

"I now repeat the charges I have made in the most specific form:—

"1. I charge the judges with citing the Rev. Mr. McClelland as proving what he denies.

"2. With citing the Rev. Mr. Gage as proving, in two separate instances, what he never proves at all.

"3. With quoting expressions as having been used by Mrs. Talbot in Mullane's room, on the 19th of May, which are not deposed to by any of the witnesses.

"4. With relying on the evidence of Halloran, Finnerty, O'Brien, Mooney, and the Benns, or some or one of those witnesses, as corroboratory of Mrs. Talbot's confession, after having utterly discredited one and all of those witnesses as to the matters to which they deposed, and rejected their testimony as unworthy of belief.

"5. With having admitted, and permitted their minds to be influenced by, and with having cited and referred to in their judgment as one of the grounds of that judgment, the *hearsay* evidence of Halloran and Finnerty as to the intentions of Mrs. Talbot conveyed to the Court by the lips of the Rev. Mr. McClelland.

"6. With having deliberately suppressed or negligently overlooked the fact of the child being in the room at the time of the alleged discovery, and having consequently inferred that Mrs. Talbot was in that room at that time for a guilty purpose.

"7. With having, after the public delivery of the judgment, introduced a passage into the copy of that judgment, attempting to account for the presence of the child on that occasion, in a manner inconsistent with the judgment as originally delivered; so that after the introduction of the passage, the two parts of the judgment are contradictory to each other, and the same state of facts is referred to in one part of the judgment as conclusive, that Mrs. Talbot was *guilty at that time*, and in the other part of the judgment as conclusive that she was *not guilty at that time*.

"Either the Court has not done what it proclaims to be its duty, either it has not 'examined the evidence' and 'sifted it in detail,' in which case it was, by its own admission, guilty of a neglect of duty; OR, having 'examined the evidence,' having 'sifted it in detail,' and knowing what was and what was not in that evidence, it has deliberately and knowingly represented the evidence as containing what it did not contain, and WILFULLY FALSIFED THE TESTIMONY ON WHICH IT FOUNDS ITS JUDGMENT."

The author of the eloquently-written pamphlet before us (numbered five in the list which heads this article), thus concludes it:—

"Truly has a great artist of the last century drawn a prophetic picture of the fate of this unhappy lady (Mrs. Talbot). 'Revenge from some baneful corner shall level a tale of dishonour at thee, which no innocence of heart or integrity of conduct shall set right. CRUELTY and COWARDICE, twin ruffians, hired and set on by MALICE in the dark, shall strike together; and trust me, *when, to gratify a*

private appetite, it is once resolved upon that an innocent and helpless creature shall be sacrificed, 'tis an easy matter to pick up sticks enough from any thicket where it has strayed to make a fire to offer it up with.'

"A judicial tribunal has been found to give the sanction of a Christian nation to this sacrifice, and it is for that nation, whose honour and dignity have been scandalized, to determine whether such a tribunal shall any longer remain a reproach to its institutions, and whether those through whose instrumentality such a scandal has been perpetrated shall continue the administrators of its laws.

"The question involved in this case is not one solely of individual injustice. A foul and monstrous public wrong has been committed, and I call upon your lordship, not with a view of obtaining redress or atonement—that is impossible; the door of justice is closed, and the innocent victim of domestic perjury, clerical cruelty, a secret tribunal, and judicial blunders, must go down to the grave with the mark and seal of public infamy unobliterated and uncancelled, but, through the mercy of Providence, unconscious of her wrongs, and in happy ignorance of the name of herself and her child being associated with these loathsome and disgusting details;—but I call upon your lordship, as the Vicegerent of Her who is the head and fountain of justice, relying on those feelings of humanity, which have never failed to be associated with your name, to prompt you to take such measures as shall ensure that no other innocent woman shall be sacrificed to the like injustice of Ecclesiastical Courts. If that pestilence is stayed, the blood of the victim will not have been scattered on the threshing floor in vain."

It would be a neglect of duty on our part were we to omit the earliest opportunity of calling the attention of our readers to the fearful issue which is thus raised. It is no case of anonymous slander; Mr. Paget is, we believe, an active magistrate in his county, daily discharging functions of a like nature, and deriving his commission from the same authority as the judges, whose conduct he impugns; and both the county and the borough of Leicester have been repeatedly represented in Parliament by members of his family. His brother, Mr. John Paget, is a barrister of considerable standing, not unknown in the profession, and was principal secretary to the late Lord Truro whilst Lord Chancellor.

Until we see what course the judges may adopt to repel the very serious charges which have thus been brought against them, it would be premature to express any opinion whatever

with regard to their validity; it is, however, but justice to state that in each individual instance, Mr. Paget cites the evidence of the witness, upon which he relies, as the foundation of his charge, and gives his readers an opportunity of forming their own opinion as to the justice of his observations. If it be true, as Mr. Paget alleges, that in trying a question of such vital importance as was before them in this case, the judges have quoted one witness as saying what he denies, and another as deposing to words as having been used by an accused person, which are nowhere to be found in his evidence; if they have admitted hearsay evidence; if they have overlooked a fact so material as the presence of a child of nearly seven years old in a room in which, and at a time when, the mother of that child is charged to have committed adultery; and then, as Mr. Paget alleges, altered their judgment after its delivery, so as to make it fit the facts which they had subsequently discovered, and conceal their neglect;—the unavoidable conclusion is, that neither life nor property are safe for an hour in a country where such judges remain on the Bench. It is equally clear that if these charges are groundless, it is a duty which the judges owe to themselves, to their country, to the purity of the administration of law, and the sanctity of justice, that their falsehood should be exposed, and the honour of the Bench vindicated.

The high reputation of our judges, the deep respect entertained by all ranks and classes for the judicial character, the veneration with which we regard the Bench, are not lightly to be attacked, or disturbed and shaken with impunity; but the correlative duty is no less important, and the very feelings we value so highly depend, for their existence, on the fearlessness with which the conduct of our judges may be canvassed, and the freedom of the strictures by which it may be impugned. It would be an evil day, above all for our judges themselves, in which that fearlessness were to wax cold, or that freedom to be restricted.

The matter, as we have already observed, cannot stop here. We shall await the result with deep interest. A question which

involves, not only the policy of our laws, but what is of equal, if not greater importance, the purity of their administration, has been raised, and all who are concerned in the stability of our institutions are entitled to have that question answered.

Art. IV.—THE JUDGMENT OF THE RIGHT HON. STEPHEN LUSHINGTON, D.C.L., &c. &c. &c.,

Delivered in the Consistory Court of the Bishop of London in the cases of Westerton against Liddell (clerk) and Howe and others, and Beal against Liddell (clerk) and Parker and Evans, on 5th December, 1855. Edited by A. F. Bayford, D.C.L. London: Butterworths.

IN times past a different tone has at different periods predominated in the English Church. In one age it has been given by Grindall, in another by Laud. But these untoward differences disappeared during the last century, and the Church settled down into a *via media,* equally free from the harsh rigorism of the one as from the high-flown and affected formalism of the other. It was, nevertheless, reserved for the present century to see the Laudian school awake from its slumbers with a strength which it probably never had before. In this revived school Laud became out-Lauded, and the principles of the Reformation were fearlessly flouted by it in private converse and in the public places.

The Church was at first but little prepared to meet an attack which was carried on under the shade of her own institutions, and the innovations of this party, in direct proportion to the absence of resistance in quarters where a stand should have been made, gathered strength, and became the more *pronounced* as they obtained the favour of the weak and the credulous. For these the attractions were as varied as their various vacuities demanded. To some the attraction was the spurious and unwholesome learning vented from the pulpits, and urged in the

writings of this priesthood; to others it was the gaud and glitter of gilded candlestick and jewelled cross, or the glare of coloured and embroidered altar-cloths; and to others the restored forms of mediæval architecture and symbolism, to which only a plenitude of superstition could assign a living and efficacious meaning. All these unreal and miserable triflings seduced many unhealthy minds, and nowhere more abundantly than in our great Babel. Conspicuous amongst the churches which had assumed this character, was Saint Paul's, Knightsbridge, until it was eclipsed by Saint Barnabas, Chelsea, which had been erected under the same influences. At St. Paul's (apart from the doctrines there inculcated, with which we do not meddle) there was much practical Romanizing; the faithful contemplated not a movable table, as the canons require, but a massive, elaborate, and immovable altar, built of wood certainly, but formed to imitate the altar-tomb of Rome, accompanied by an appropriate credence-table; massive gilded candlesticks, with lighted candles, and an imposing cross, crowned this altar, and gaudy cloths decorated it, varying as the feasts of the Church succeeded each other.

This ornamentation might be supposed to have been sufficient for an English atmosphere, but it was not enough for the aspirations of those persons, under whose eye, and for whose tastes, St. Barnabas was built. There impunity led to its usual results. As successful larceny will incite to a more lucrative system of plunder, as hocussing will eventually suggest the administration of more scientific venom, so the diluted Romanism of St. Paul's was exchanged for a stronger and less mixed spirit at St. Barnabas. There the altar became stone, though the candlesticks and the candles resembled their predecessor; there a rood-screen, with brazen gates, excluded the benighted *laos* from the contact of its spiritual intercessors; there the cross on the altar was more costly in its jewellery and its engraving; the coverings and cloths were not only as rich and gaudy as in the other church, but the costliest Honiton or Limerick lent its aid to attract and arrest the religious eye. And all this was daily seen in Protestant London; parishioners and out-parishioners (to the defeazance of the parochial system)

flocking in crowds to such ministrations. This state of things endured for some time, but at length the exhausted patience of certain public-spirited parishioners and churchwardens brought the question before the legal authorities, by an application for a faculty in the one case, and a monition in the other, to remove the objectionable articles. To this we owe the judgment of Dr. Lushington, who, as Chancellor of the Diocese of London, was called upon to adjudicate on this subject. We will now call the reader's attention to the judgment itself, an authorized report of which is now before us.

It had been pressed upon the Court that many of the things complained of were placed in the churches previously to their consecration, and that the bishop by that act had stamped them with the approbation of his authority. This argument is easily disposed of by Dr. Lushington *in limine*, for it is a principle of the Canon Law that such things cannot be legally and satisfactorily discussed until after consecration, as until then they do not come within the control of the bishop's chancellor, to whom such questions by law belong.

Dr. Lushington divides the articles complained of into two sections, containing such as are properly to be termed ornaments of the church, and such as are not; and as the two questions are distinct and separate, so the rules which apply to the one and the other are equally distinct. Altars and credence-tables are not to be deemed ornaments, and therefore the questions regarding them can only be decided by reference to the general law of the Anglican Church; for the order in the Book of Common Prayer preceding the Morning Service, to which we shall afterwards advert, provides for ornaments only. In regard to the altars of the two churches, the question was, Were they legal in their form and in their material? The law requires them to be movable tables of wood. Tried by this rule, the elaborated altar of Saint Paul's escaped condemnation, though narrowly. Dr. Lushington observed, "With respect to its shape, though I wholly disapprove of the making any communion-table to resemble a tomb, or any imitation of any such practice, yet I do not think that shape so prominent as to call for the interposition of legal correction."

But the altar of Saint Barnabas had no chance of escape, owing to its material. The judgment of Sir Herbert Jenner Fust, in the case of Faulkner *v.* Litchfield in the Arches Court, with which he declared his entire concurrence, had expressly prejudged this matter; Dr. Lushington, therefore, pronounced this altar to be illegal.

The question of the credence-tables was simply whether the law recognised such articles in any form or under any circumstances. But the same judgment in Faulkner *v.* Litchfield had settled this question also.

The question of the ornaments of the Church might be considered an open one. It had never received a judicial interpretation. Here, then, was a fair field for the exercise of the consummate talent and learning of this distinguished judge, whose sentence we have now under review: here was a task replete with difficulty, and overshadowed with obscurity. But in it was involved a question vital to the true interests of Anglican Protestantism; and well and worthily has this great judge discharged his duty. The primary authority for the ornaments, furniture, and decorations of the Church is contained, as we have mentioned, in the Rubric, and is, in fact, a reference to the first Book of Common Prayer of Edward VI. They must, therefore, be such as are prescribed in that book, and nothing else; they must be such as were in use in the second year of that monarch—all else is excluded, for otherwise the whole effect of the direction would be nullified. If, therefore, any new ornaments are attempted to be introduced into our Church in the present age, the persons so introducing them must be prepared to show that they were in use in that particular year, and were such as that Book of Common Prayer prescribes; for if they cannot discharge this burthen of proof (and the Prayer-Book of King Edward affords them no assistance, description, or specification), it must follow that the articles themselves must and can only be tested by the usage of the Church, and the Court has a right to look to what was done before and after that year by competent authority, such as injunctions and canons, and thus prevent the mischief which would arise if it were held that, because no Church ornaments

are mentioned, none are lawful, or there is no law at all applicable to them. Dr. Lushington accordingly takes into consideration all that was enjoined or prohibited from 1549 to 1662, either by the authority of the sovereign, or by canons, and at visitations, with the twofold object of ascertaining the intention of Parliament in making such a reference, and the usage of the Church from 1549 to the present time. The learned judge of course prefers the evidence of those who lived at or nearest to the time in question, and Elizabethan authorities therefore carry greater weight with him than the usages temporarily introduced in the two succeeding reigns. Parker and Grindall are, in his eyes, more trustworthy guides than Laud and Juxon; for the real inquiry is not whether these matters were in use in primitive times, but whether they have been engrafted into our Reformed Church, and have been confirmed by competent authority. Those who act otherwise assume to be wiser than our Reformers and our Church.

"But," says Dr. Lushington, in a passage of great beauty and feeling, "is the wisdom of men so improved that we can venture upon any departure either from the doctrines or practices of our ancestors with impunity? Have we not, even in our own day, witnessed a sad example of the danger of endeavouring anew to reform that which our Reformers left us, and assimilate our system to the Church of Rome? Have we not seen what never has before, from the days of Cranmer, been seen in this land—not less, in a very few years, than one hundred clergymen of our Church secede to Rome, and who were, many of them, men of undoubted piety, of great learning, and blameless lives? See the monuments erected to the memory of the martyrs of our own Church at Oxford, and read the names of those who took a leading part in that work! How many have seceded from that Church which they sought to preserve by honouring the memory of its first restorers and martyrs? Ought we not, then, to pause—to doubt our own strength and our own judgment—when we seek to mend that which they bequeathed to us, consecrated by their own blood? Ought we not to hesitate before we admit any one practice, any one thing, not sanctioned by them, and more especially any one thing

which has the remotest leaning to the Church of Rome and her usages, which our reformed faith holds in just abhorrence? Is it not wiser to keep on the safe side,—to omit rather that which may be innocent in itself, even decorous or ornamental,—than run the remotest risk of consequences so much to be deplored."

There can be no doubt that the position of the learned judge is true: whatever was repudiated by competent authority, and disallowed generally from the epoch of the Reformation, cannot have been in legal use at the time in question. And as the result of a careful and critical examination of all the authorities and evidence, Dr. Lushington comes to the conclusion that crosses, candlesticks, and altar-cloths, which all rank under the head of ornaments, were abrogated and disallowed by competent authority at the Reformation, and are now illegal. The crosses had been abused to superstitious uses, and candlesticks, candles, and altar-cloths were only adjuncts of the mass.

Dr. Lushington leaves the screen at St. Barnabas, and its brazen gates, standing, "not being satisfied that these articles are clearly contrary to law."

The reader will see that we have attempted no more than to give a skeleton of this memorable judgment. For the rest he must refer to it himself, and he will there find, not only the whole law of the subject skilfully and admirably elucidated, but abundant passages of rich historical illustration, relieved by the most acute observation and profound thought. The past year witnessed two striking events,—the Austrian Concordat and this judgment of Dr. Lushington. By their aid we may accurately compare the relative states of the two empires; and in reference to ourselves we may exultingly say, "Happy are the people that are in such a case!"

Art. V.—THE PAST AND PRESENT STATE OF DOCTORS' COMMONS.

THOUGH much has been said and written by the opponents of Church Courts, respecting the presumed tendencies and abuses of those antique tribunals, yet we still lack an exact and critical account of their legal constitution and machinery. Though the latter may be too prosaic a subject for fervid writers and enthusiastic orators, we, notwithstanding, think that the public is entitled to expect, at the hands of others not so highly gifted, such sincere and practical information as will give it a true idea of the legal *status* and actual duties of its servants in those Courts. This is, of course, too unpretending a task for polemical debaters or speculative dissertators; but we, not being so aspirative, have no objection to undertake it, consoling ourselves with the reflection, that though we shall have no opportunity of grandiloquence and wrath, we shall probably be more practically useful, than if such opportunity being presented, we had lavishly availed ourselves of it. The question of the abolition of the Ecclesiastical Courts, is not confined to those great and abstract problems, the solution of which cheers and incites the reformer in the prosecution of his Procrustean labours; but it has also a sensible bearing upon particular interests, as involving the social position of the individuals who are compromised by the projected changes. What these interests are we shall endeavour to show, by elucidating, as far as our means afford, the constitution and machinery of the Courts themselves. This part we have chosen, not merely because no one else has appropriated it; but also because we think it deserves of our countrymen a careful and conscientious attention.

In pursuing our research, we shall feel at liberty to confine ourselves to the Prerogative Court in Doctors' Commons, because of that it may be justly said, "*in ipsâ universa continentur;*" and we shall only advert to the other Courts when

their independent practices and customs illustrate those matters which are more immediately under our consideration.

The business of the Prerogative Court is twofold, voluntary and contentious; and each section is clearly and sharply distinguished from the other. The first, which is vulgarly called "common form," is of a peculiar nature, having no connection with or analogy to any of the *molimina rerum* which occupy and embarrass the other Courts of the kingdom. It consists in granting probates of wills and letters of administration, being the realization of the ordinary's right of committing to executors and next of kin the seisin of the legal estate which is vested in him by and on the occasion of the decease of all testate and intestate persons. The other division consists of causes of litigation on these subjects. Each form, however, is but part of the same jurisdiction, requiring the exercise of the same judicial authority. But the common form, demanding greater facilities to meet the necessities of the general public, to whose bosoms and hearths such transactions come home, forced upon the Court, at an early period, a most important modification of its strict procedure. All business, whether in solemn or common form, is transacted *in curiâ*, and must be made the subject of a judicial order or decree. Whether a will be established, and an intestacy be pronounced for in the contentious jurisdiction, or probate of a will, and letters of administration be granted in the voluntary jurisdiction, a Court must sit for the purpose of making an order or decree carrying out these objects. But according as the contentious or the voluntary jurisdiction is exercised, the formation of the Court which sits for that purpose varies in certain mere details. In the one case the Court is composed of the judge and a deputy-registrar, besides the proctors and advocates of the litigant parties; in the other it is formed less solemnly of the judge's surrogate (or legally appointed substitute) and a proctor, with the individual or individuals who apply for the grant of personal representation.

The Courts are, therefore, differently formed, according as the subject-matter in question itself differs. But the discrepancy in the formation of the two Courts, is, as we shall afterwards more clearly see, apparent only, and not real; for the proctor in

common form does not play the part which the mere etymology of his name would indicate, but acts *vice* the registrar in the surrogate's Court, as the deputy acts *vice* the same registrar in the judge's Court. The proctor's acts in the *common* form are thus radically different from the duties performed by him in the *solemn* form, in which latter he enacts merely the part of the ancient clerk in Court, being also a pleader as well as practitioner. As the variation in the formation of the two Courts, is thus to be laid at the door of the proctor, we must in order to arrive at a true theory of the constitution of Doctors' Commons, start by a research (or what Lord Bacon calls a *prudens quæstio*) into the true *status* of that functionary.

We will open our inquiry by a consideration of the proceedings taken in intestacy. The party who wishes to become the personal representative of an intestate applies to the proctor with that intent; the latter, by an impartial (because a responsible) examination of the circumstances of the case, ascertains that the claim is good. The documents for showing it to be so are then prepared by him; the applicant, attending before a surrogate, in the presence of the proctor, verifies this assertion by his oath, and is also sworn to the due execution of the proposed trust. And upon this the surrogate, in the name and by the authority of the ordinary, decrees the letters of administration to be made out and granted to him; and the only exceptions to surrogates' decrees occur where persons having a prior right have not waived it, but have been cited, and where the proctor and deputy-registrar cannot agree upon or cannot find the law of the case. The decree of the surrogate in all grants, save those of probate to an executor, is embodied in an *act* or record containing the facts of the application, the proof of their having been verified, and the decree itself. This *act* is drawn by the proctor, who is always a notary also, and is *de jure* notarially attested by him, for without an attestation of that nature it has not the force of a canonical record. It is afterwards presented, with other necessary documents, to the clerk of the seat, and is filed. From this *act*, and from nought else, the clerk of the seat draws the letters of administration. To the latter a deputy-registrar gives his

signature, and they are perfected by the seal of the Court. In the case of probate a similar proceeding is followed, with the exception that no act decreeing the probate is now drawn and filed, unless the executor or executors are resident at a distance from the registry, and are consequently sworn by a commission.

In what we have just stated, we have described the modern formation of the Court in common form, and its machinery for carrying out its decrees. But it will not surprise our readers when we say that things were not always so, and that their present state, as we have already asserted, is but an expansion and a development of a more rigid, as well as more pristine procedure. In fact, all common form business was originally transacted by the registrar and the judge single-handed, these units forming the original Court for common form, as the judge and a deputy-registrar still do so for solemn form.

That this original simplicity of procedure should have been applied by the Court even to common form need not startle the reader, if he will call to mind that the Church has ever affected unity as its darling type; and in her wisdom she has ever preferred to exercise her power by few agents, knowing the unspeakable advantages of unity in administrative and judicial functions. The Canon Law is steeped in this principle, which is the basis of hierarchy. One bishop fills one see; there is one ordinary, one judge, one registrar. But whilst the Church has loved unity in respect of all her paramount and dignified offices, where that active and salutary principle can be realized, she has met the practical difficulties consequent upon insufficient agencies and means of execution, by allowing an unlimited deputation of subordinate though responsible ministers. Thus ideal unity has been preserved, while secular utility has been provided for. And whilst the archbishops or bishops formerly appointed their chancellors to act for them *in curid*, without infringing the principles of the hierarchy, by the same principle those judges appointed *their* surrogates; and *the* registrars, as we shall hereafter see, adopted the same precedent, and extended the chain by additional links. As the Canon Law became fixed and consolidated in its principles, the ordinary was held to be bound to appoint a chancellor or judge for the exercise of his secular

jurisdiction.[1] But, by an equally settled principle, this judge was powerless to exert that deputed authority, unless he were assisted by the assessorship and co-operation of a registrar or actuary, to hear his decrees made, to record them as public acts, and to retain them exclusively and inviolably in his custody for the protection and instruction of the public.[2]

Ayliffe says: "That the truth of things may the better appear, the law enjoins that all acts which are sped either in an ordinary or extraordinary judicial process be written by a notary public or register (*i. e.* registrar) . . . . . And if the judge shall neglect the matters aforesaid, he shall be punished by his superior judge; and no presumption shall be in favour of the process, any further than the cause appears by proper and lawful documents." And the 123rd Canon (reproducing the ancient law) enacts, "That no chancellor, commissary, archdeacon, official, or any other person using ecclesiastical jurisdiction, shall speed any judicial act, either of contentious or voluntary jurisdiction, except he have the ordinary register (*i. e.* registrar) of that Court, or his lawful deputy; or if he or they will not or cannot be present, then such persons as by law are allowed in that behalf to write or speed the same, under pain of suspension *ipso facto*." We shall draw attention to this Canon a little further on.

Of these two, in conjunction, the Ecclesiastical Court was canonically constituted. This was and is the strict type of its constitution, and without the co-presence of the judge and the registrar, no Court could be formed, and no decree could be pronounced by the judge, as no decree could be recorded. This was the principle in its strictness and rigour, but it was not invariable and unbending. It could be relaxed when either functionary was absent, sick, or preoccupied. In these contingencies the judge could substitute a surrogate to sit for him in the judgment-seat, or, in the words of the 128th Canon, "to keep court for him;"[3] and the registrar, when similarly hindered, was equally permitted, by the law of the Church, to find a sufficient deputy to fill his place. We have now arrived at a

[1] Ayliffe's Parergon, p. 161. [2] Ibid. pp. 29, 382, 383.
[3] Dr. R. Phillimore's Burn's Ecclesiastical Law, vol. iii. p. 667.

point from which we will track the registrar home through his developments, confidently promising that we shall therein find the clue to the legal *status* of the other important ministers of the registry in Doctors' Commons. We will open our labours with the patent of the present registrar, the Reverend Robert Moore. We take up this modern document, because, while accessible of reference, it is at the same time in literal accordance with all the patents granted since the creation of the Prerogative Court. The one is in a blue book of 1823, and the others are buried amongst the archiepiscopal muniments.[1]

The patent of the Reverend Robert Moore gives, grants, and confirms to him the office of registrar and writer of the archbishop's acts and of his prerogative, with all the fees, profits, and revenues of that office, and ordains and deputes him accordingly. The appointment is thus a conjoint or accumulated one, being to the two offices of registrar and writer of the acts (or actuary) of the archbishop. Though the reader, unversed in the mysteries of the Canons, may be surprised at finding a distinction between the two offices, yet that distinction is nevertheless real and actually operative, and should be clearly understood, as it is only by a correct conception of their functional differences that we can hope to succeed in elucidating our present theme.

The office of registrar, though now in common parlance used as an appellation comprehensive of the two functions, conferred by the patent, in truth and law meant, and in the patent itself still means, none other employment than the custody of the registry and its records. Ayliffe observes:—"We here in England confine the word *registrarius* to the officer of some Court, who hath the custody of the records and archives of such Court, and distinguish him from the actuary thereof."[2] The conjoined office of writer of acts, or actuary, comprises the remaining *ministerium*. In some Courts this office was not always conjunct, but was conferred upon a different individual. But in the Prerogative Court, as it would seem, the offices

[1] See Report of 1823, p. 166, and "Blamyr," in the Prerogative Registry, p. 16, in which latter is the patent of Barratt as "*Registrarius et actorum scriba*," granted by Archbishop Henry Dene in 1502.

[2] Parergon, p. 383.

have never been found separated. Oughton, indeed, represents the *scriba actorum et registrarius* in the Arches Court as two distinct personages.[1] But the presentment of 1734 shows, that though the offices of registrar and actuary in the latter Court were accumulated, and no distinction could be made, the person holding them was appointed by two different patents.[2]

This *insolens verbum*, which the presentment of 1734 is unable to explain, means and expresses the drawing of all orders and decrees done in and by the authority of a Canonical Court, and of all documents and instruments which contain them. It also, in its wide circle, comprehends the taking of all proofs and evidence in matters and causes depending before the Court.[3] As the latter use of the term may appear extraordinary, we will illustrate it by the practice and usage of the Courts. The examination of a witness was, and is still in theory, *actum in curiâ*, or an act of Court, though in reality it is taken by the examiner alone. By the Canon Law the judge should question the witness in the presence of the registrar, and the latter should record the witness's answers and evidence; and we have before shown that the judge and registrar form a Canonical Court. In modern times, though the theory is the same, a deviation has been made in practice; but it is accompanied by a ceremony which shadows forth the ancient principle. In order to give to a deposition its curial character, without which the law cannot recognise it, the witness is *repeated*, *i.e.* the witness being still under the obligation of his oath, acknowleges the truth of his deposition before a surrogate, in the presence of the examiner or actuary, *i.e. in curiâ*. Until a century and a half ago, the examinations of witnesses were taken by the deputy-registrars, under their authority of actuary. The examiner who has succeeded them in this department of their actuaryship, is still always called either actuary or writer of acts, in the commissions for the examination of witnesses, and in the strict language of the Court, and he also subscribes the depositions *eo nomine*.

This explanation disposes of the relative functions of the registrar and actuary, and of their original and actual differences.

[1] Prolegomena, p. 12. [2] Report of 1823, p. 7. [3] Ayliffe, p. 383.

In proceeding with our examination of the patent, we find a full power given to the registrar and actuary to depute a sufficient deputy or deputies, for the better execution of the duties of his offices. This has been a pregnant clause, for, as we shall see, it has in the course of time engendered the present *état major* of the registry. Having thus ascertained the true and literal meaning of these appellations, we can now without the least difficulty *remonter aux sources*, and realize the registrar and actuary in his normal and undeveloped state; and there we shall find him performing, with the agency of his assistant clerks, all the acts of common form. In his original phase he inquires into the title of applicants for grants; he superintends their being sworn in the judge's or the surrogate's Court; he draws the act or record; he commits it to his clerks, who therefrom prepare the grant; he signs the latter, and the whole work is commenced, prosecuted, and completed by himself and by his agents upon his responsibility. The reader's surprise at our *précis* must not prohibit his assent to it; for what we have stated, as the result of independent and *à priori* reasoning, is still the law of the land at the present day in some ecclesiastical jurisdictions, where the causes which induced the actual condition of the Prerogative registry have never been in operation; and thus matters would have remained in that Court, and thus they did remain so long as its business, being small, was practicable under such a system. But industry and capital had begun to effect their miracles at a very early age in England; and the work of the actuary of the Prerogative, keeping pace with the material prosperity of the country, made it desirable, as his increasing fees made it easy, for him to avail himself of his power of deputation, and to entrust to others a portion of his own duties. He felt that the responsible labour must be divided, and proceeded to effect a division after the following manner. He had been accustomed, as we have seen, to examine into the title of all applicants, to prepare the proofs, and to draw the orders and decrees granting the required probate or letters of administration. This portion of his functions was a business in itself: it was enough for separate shoulders, and could bear separation and

transfer. But who were the persons to whom he could transfer it? As they were to be responsible ministers, they must possess qualifications, which the Canons required and recognised; they must have legal learning and *peritia*, combined with an authorised public position. When he sought such men, he had not far to go: they were at hand—they were the proctors *ad lites* of his own Court. These men had the required qualifications for drawing acts or public instruments, and for doing any portion of the actuaryship; for they all were and were required to be (as they have ever been) *notaries*. They therefore possessed the qualification which lay at the base of his own, viz. the *notariate*, for without that no actuary could exercise his functions, and so the law still is.[1] The effect of a notary's subscription or attestation, as most persons know, is to impart to the instruments or writings to which it is is apposed full faith and credit—*facere fidem* are the words of the Canon Law. Because of this qualification the Canon Law, in appointing its ministers to perform an office, whether in permanency or *pro vice*, always selected a notary for the agency; and this is to be understood strictly and fully, without any modification whatever. But the notariate not only supplies the required qualification or *peritia*, it also provides a moral guarantee for the due execution of the proposed office,—a guarantee which in secular offices is provided by a specific oath for the particular function. In all canonical appointments, at the base of which the notariate lies, no oath of that nature is administered. The office itself is executed under the security of the notarial oath. Accordingly, no acting registrar or examiner in the Ecclesiastical Courts is or has ever been sworn as such. The explanation was given by an examiner of the Prerogative Court to the judges at the Old Bailey some years back, in a case respecting the will of a Mr. Panton, and it helped to allay their surprise at finding that the former had not been sworn in his peculiar capacity of examiner. Oughton, in his comment upon Clerke's words "*Registrarius ad hoc juratus*," says, "*Scilicet in vim juramenti notarii publici, quod ante præstabat tempore suæ admissionis in notariatûs officium*" (*tit.* 85, *de Testium Examinatione*).

[1] Ayliffe's Parergon, p. 383.

The registrar accordingly called the notaries into the registry, and deputed to them that section of his duties which the proctors of the Prerogative have ever since executed. The proctors thenceforward became, and still are, actuaries in common form, and attended, as they still do, the surrogate's Court in that capacity, *vice* the registrar, being, as the 123rd Canon calls them, "persons by law allowed in that behalf." This was the first step taken towards the now existing state of things.

But although the registrar had assigned to the proctors that part of his actuaryship which we have just now described, he still retained to himself the preparation of the grants, and also of the bonds and commissions preceding them. For this was done originally, as now, by the clerks of the seats, who execute their office during the pleasure of the registrar.[1]

But the registrar's progression was not fated to stop at this point. He shortly afterwards determined to rest altogether from his labours.

He had, as we have seen, divested himself of a great part of his functions as actuary. He now resolved to divest himself of all the remaining active duties of that office; and he did so, appointing the substitutes who are now known by the name of deputy-registrars, and giving to them the rest of all his fees, *ratione qua* actuary. But he retained the registrarship strictly so called, apparently reserving to himself also the whole fees of that function.

We can now go no further with our deductions, for we have arrived at the modern scheme, and its mode of operation. We thus see that the proctors in common form, and the deputy-registrars (assisted by the clerks of seats), combine to execute the functions of the actuaryship, as those functions were formerly executed by the principal registrar alone. By a curious fate, however, while the deputy-registrars have taken a name which does not belong to them, the proctor has lost the appellation of the most important and responsible of his functions—unlike the conjoined advocate and surrogate, who has managed to keep his names as distinct as his duties.

This is an accurate statement of the mode in which the

[1] Report of 1832, p. 12, and 10 Geo. 4, c. 53, s. 7.

present staff of the Prerogative Registry has originated; but, as with many other of our legal complications, the public has been at a loss to form a correct judgment of the true position of its servants, from the *inertia*, probably, of the latter to afford the proper information; forgetting, probably, that such matters cannot take the high ground of a moral principle, which sometimes *tacendo clamat*, but require of their asserters a full and clear vindication to make their claims understood, however just they may be. The legal *status* of the deputy-registrars appears to have been generally well understood; but the composite action of the proctorship, and the disuse of one of his appellations, have certainly very considerably mystified the comprehension of the public; and the latter, misled by his name of *proctor*, has been inclined to regard him as an exclusive practitioner only—not as such combined with an honourable and responsible public office. For this mystification we think the proctors have to thank themselves; for a very little trouble on their part would, in our opinion, have irrevocably dispelled it. The details which *we* have given respecting their origin, afford a thorough refutation of this misconception.

But the same conclusion can also be arrived at by the contrary process, viz., by an induction from his acts and the details of his duties. In order to execute our task completely, we will attempt this also. Other Testamentary Courts, existing under different circumstances, illustrate the position of the proctors of the Prerogative by the reflected light of contrast. The wealth of London and those other dioceses which, combined, form the province of Canterbury, occasioned, as we have said, the changes and development in the formation and machinery of that Court. But where the same powerful influences have never been at work, and the Courts remain in their primitive and unexpanded state, we find no traces of that machinery which the Prerogative has for centuries possessed. In them there are no proctors in common form, and no clerks of seats. But, on the contrary, the registrar does all the business of passing probates and administrations, charging for them, not as the deputies of the Rev. Mr. Robert Moore do, but receiving those fees also which in the other Court go to the proctor and the clerk of the seat.

The legality of this practice is shown by the usage both of England and Ireland; and in the latter country, it was made the subject of litigation, and received the most solemn judicial sanction in Stephenson *v.* Higginson.[1] The circumstances were as follows:—

George Stephenson was a proctor of the Ecclesiastical Court of the Bishop of Down and Connor, and Henry Theophilus Higginson was registrar of the Diocese of Down and Connor, but was not a proctor of the Ecclesiastical Court there, or of any other Ecclesiastical Court in Ireland. Higginson, while such registrar, had been in the habit of extracting probates of wills where there was no testamentary contest, and of drawing up and engrossing affidavits to verify the same, and of performing various other acts relating to the obtaining and procuring of letters testamentary, which belonged, as Stephenson alleged, to the office and practice of a proctor. He had also been in the habit of making charges for the performance of these acts, in addition to the fees to which he was entitled as registrar. An action for debt, under 54 Geo. 3, c. 68, s. 10 (for Ireland), was brought against Higginson for doing proctorial acts without having been admitted as a proctor. It appeared that there were several proctors practising in the Court, and that he (the defendant) had never been admitted or enrolled as a proctor. The defendant produced witnesses from the Ecclesiastical Courts of Dublin and Chester, to prove a custom for the registrar to do these acts, and to receive fees on account of them, in addition to his official fees.

The jury found a verdict for the defendant, in accordance with the direction of the judge (Mr. Justice Crampton). On the 15th April, 1846, judgment was entered for the defendant by the Court of Exchequer, overruling the exceptions which had been taken to it. On the 12th May, 1846, the plaintiff brought a writ of error in the Court of Exchequer in Ireland. There the judgment was affirmed by a majority of seven to four. The case was then taken to the House of Lords on a writ of error.

[1] House of Lords Cases, by Clark, vol. iii. p. 639, 1851 and 1852. For England, see also the examinations of Mr. Trevor and the Diocesan Registrars, in the Report of 1832.

Barons Parke and Alderson, Justices Patteson, Coleridge, Maule, Wightman, Erle, Williams, and Talfourd, and Mr. Baron Martin attended the argument. The legality of the registrar's acts was affirmed in the Lords, the acts for which he was indicted being considered by them to be registrarial as well as proctorial, and the Act of Parliament not making them by necessity proctorial more than they were before.

The explanation of this practice is obvious; the registrar is the only actuary of a Court so constituted, just as he was in the primitive times of the Prerogative. We have before described the proctor's acts in transacting common form; that they are absolutely necessary, as being official or curial; and that by law he is the only person qualified to do them, *vice* the registrar, can be easily shown by their own evidence. By what we have before said, the reader will have observed, that no steps can be taken in pursuance of the surrogate's decree until the *act* or record, embodying the facts of the application, their verification, and the tenor of the decree itself has been drawn up by the proctor; and that upon the presentation of this *act* to the clerk of the seat, that officer, obeying the order contained in it, prepares the grant; and the deputy-registrar, in further obedience to the order, signs and perfects it, and the person thus obtains his grant. Thus, without the *act* which the proctor alone is empowered to draw, the grant could not be made; and simply so because, by the Canon Law, as we have already shown, no oath can be administered, and no decree can be made by the surrogate who acts *vice* the judge, unless the proctor, who acts *vice* the registrar or actuary, be present to vouch for the *bona fides* of the applicant, and to draw up and attest the record. There is another duty of the proctor, simple enough in itself, but, like other official acts, involving the deepest responsibility. Upon the proctor is devolved the engrossment of the will as proved, which is an essential part of the probate itself.

It is unnecessary to make any comment upon the profound importance of this act, which is unquestionably *curial*. In all these the purblind must see that the proctor is not acting as procurator, but as an impartial and responsible official of the registry; and to a right understanding of this we have given

the clue. Besides these more important duties, there are other circumstances of a privileged character, which establish the proctor's official character in the registry: the records of the Court (viz., the registered wills and act-books) are open to him without fee. He is considered to act in all common form matters with the most perfect candour towards the Court, without any reservation whatever in favour of individuals. He has not only always looked upon himself as an official, but the Government itself, in 1811, applied to the proctors first for copies of all wills proved, and though it eventually, through a pecuniary disagreement, came to the conclusion to take them of the registrar, it expressly reserved to itself the right to resort to the proctors thereafter, if it should think fit to do so.[1] It is no objection to the official character of a proctor that the public are left free to select their own proctor, without *rota* or division. The proctors themselves have an equal discretion in contentious business to select the examiner; and in common form, until the beginning of the last century, they selected their clerk of the seat. Nor can an argument, in exception, be drawn from the fact of the proctor charging and receiving his own fees; for such has ever been the scheme of the Court since the labours of the registrar were divided. The registrar's patent grants to him all the fees of the office; but when its functions were severed, as we have shown, the persons who took the divisional duties took the fees of the department also. Accordingly, now the principal registrar, the proctors, the clerks of the seats, the deputy-registrars, and the examiners, severally receive their own fees to their own use, and no augmentation of the fees has taken place in favour of any of them. The arrangement has apparently been an equitable adjustment out of what was a general fund.

The legality of the acts commonly called proctorial is also directly established by statute. But the well-considered and grave opinions of the judges, even under this misplaced name, have recognised the proctors as in reality exercising functions which are curial. In Stephenson *v.* Higginson, Mr. Justice

[1] Report of 1823, p. 237. *Vide* the Treasury Minute of 19th July, 1811.

Erle pointed out that the proctorial acts in common form are "really curial."[1]

The appointment of the proctors *ad lites* to be actuaries of the registry was originally by parol, as, indeed, until very late times, were all appointments in the nature of deputation. Until after the passing of Geo. 4, c. 53, those of the deputy-registrar and examiner were.[2] That of the surrogate is still made in this form; but the appointment of the proctor to be an actuary has long since become disused and obsolete, and he now holds his office as appended to, though distinct from, his proctorship and notariate. His office is not revocable at will, like those of the deputy-registrars, the clerks of seats, and the surrogates; the former of whom hold merely during the life or pleasure of the registrar, as the latter does during the life or pleasure of the judge. It is to all intents a freehold, for, being curial in its nature, it cannot be revoked, but lasts as long as the life of its possessor.

The proctor is therefore *biformis;* he is an official having a freehold in his office, and also an exclusive practitioner, like the ancient clerk in court. But, notwithstanding such very sufficient legal claims, these facts have been somewhat lost sight of in the various *projets de lois* of late years for the reformation of the Testamentary Courts; for, while the registrar, deputy-registrars, clerks of seats, and others, were to receive compensation or equivalent, the proctor, by virtue of his unfortunate dualism, was to be left very far short of either. This has been, doubtless, owing to inadvertence on the part of the distinguished legists who have prepared the measures; but, if carried out, it would certainly be a shortcoming unworthy of a solvent nation, unless the proctors, being like Dr. Johnson's martyrs, "have a right to suffer." If the public, however, be determined to do the proctor's business itself, or to hand it over to a new board, we should say let it do so, and we should recommend the proctor to submit; for, as has been well observed, "Il n'y a que les gens faibles qui ne plient jamais quand ils le doivent." But, as the price of such submission, the public should bear in mind,

[1] Clark's Cases, vol. iii. p. 661.
[2] Report of 1823, pp. 26, 59.

that having contracted with the proctors for a perpetuity of service, it cannot discharge them without a just and honourable equivalent. If the proctors are to be dismissed, in order to sleep away the residue of their lives, let them be enabled to retire to the country of Pantagruel, where the strongest sleeper is in the most estimation.[1] The objections to such a course are confined to gentlemen who, because they feel strongly on such merely speculative subjects as these are, at the same time, by an unavoidable consequence, think weakly. This class is well represented by Mr. Gale, who in 1823 obtained of the Commissioners the doubtful favour of being allowed to append to the blue book of that date certain *longæ ambages*, the object of which was to show that the present jurisdiction of the Ecclesiastical Courts is an usurpation, and savours of mediævalism. But Mr. Gale forgot that an usurpation of 1,000 years (for such Dupin shows to be its date) is a title as good as a grant. And the objection of mediævalism is surely a strange one for an Englishman to take. Is not the British constitution mediæval? Are not the bench of bishops, the Lord Chancellor, and the twelve judges mediæval? Is not the law of real property and of marriage mediæval? Our institutions, like our generals and our admirals, have attained a respected maturity. The Common Pleas, no less than the Arches Court, has lost the beauty of youth. Age is therefore no crime in England. *Enfin*, we say, let us sweep away the rubbish which deforms our legal institutions as fast as we can; but, whatever be our zeal or our haste, let us, whilst we do so, honestly forbear to abstract any portion of our neighbours' goods and chattels.

[1] Rabelais, II. 32.

Art. VI.—THE INNS OF COURT COMMISSION.

Report of the Commissioners appointed to inquire into the Arrangements in the Inns of Court and Inns of Chancery for promoting the Study of the Law and Jurisprudence, presented to both Houses of Parliament by command of Her Majesty.

NO reader of the *Law Magazine*, we think, will deny that the existence of a highly-educated, liberal-minded, independent, and enlightened Bar, is of vital importance to the well-being of the community, and to the onward progress of this country towards the highest grade of civilization and refinement. Without arguing, then, in support of a proposition which nobody disputes, we will rather apply ourselves to a solution of the question, How and by what specific means may the creation and permanent existence amongst us of a Bar thus gifted be insured and guaranteed? To this question we think that any "layman" (or non-professional person) of common sense, would answer: "Surely, by testing in some convenient and adequate manner the qualifications of every aspirant to the degree of barrister-at-law." If further, the question were asked, "What do you mean by qualifications?" we entertain no doubt that the answer would be, "I would not restrict that term by adding to it the word 'legal;' I mean qualifications legal and general—knowledge, not merely technical, but such as any well-educated gentleman ought to possess." Such, we apprehend, to be the answers which, in some shape or other, would be made to the foregoing queries by any non-professional person, competent to give an opinion on the subject before us, and interested therein—that subject being neither more nor less than the proper mode of educating for and admitting to the Bar of England. The privileges appertaining to a member of this profession are succinctly stated in the Report of the Commissioners, which we here propose to analyze:—"He alone is allowed to plead for others in the superior Courts of Westminster, and he is not responsible to his clients for negligence

or otherwise. He alone is eligible for numerous appointments of considerable emolument and responsibility in this country, including not only the higher judicial appointments, but also the offices of Recorder, Judge of a County Court, or Commissioner of Bankruptcy, and Revising Barrister. The police magistrates of the metropolis also are now selected from the Bar. In the colonies the judicial appointments open to barristers only are also numerous."

The passage just extracted from the report shows clearly, and as we think unanswerably, why it is that the community is entitled to some kind of guarantee and security, as to "the intellectual qualifications and the professional knowledge of a barrister." Unfortunately, however, "the Government, who appoint barristers to the various judicial posts at home and in the colonies, have no available means of testing the capacity or information of the person to be appointed, beyond general reputation, or the recommendation of members of the Profession. With regard to the colonies especially, there is frequently considerable difficulty in procuring fit persons for the appointments. Men who have successfully distinguished themselves in England, are often unwilling to accept appointments in a colony; and the selection as judge or Crown officer is sometimes necessarily made either from young untried men, or, what is worse, from men who have been tried and have failed. It appears to us," further observe the commissioners, "a matter of great importance that none should be appointed to act as judges whose capacity and acquirements are likely to prove inferior to those of the counsel or attorneys who may practise before them; and it is no less important to the public interests that the Crown officers should be men of known ability, and fully competent to advise the colonial government in difficult questions" (Report, p. 14). Considering the question, then, of the education of a barrister on general principles, the commissioners arrive at the conclusion that "there ought to be a test both of the general and the professional knowledge of every candidate for the Bar." "The clergyman, the physician, the surgeon, the apothecary, as well as the attorney or solicitor, are all required to pass an examination before they are permitted to practise.

In the navy and army a like examination of officers is required before they are intitled to their first commission, and also before a lieutenancy in the one, or a captaincy in the other, is attained. In every other country in Europe an educational test is applied to advocates, either by requiring a degree in law at a university, or else by a distinct professional examination. In Scotland the faculty of advocates have, so recently as in the last year, required a test both of general and professional knowledge" (Report, p. 15).

It is observed, in a very sensibly-written and well-timed volume, which has recently appeared,[1] that "it will be readily conceded by every reasonable mind, that there is much room for improvement in England in the studies of the legal tyro. We have only to contrast the state of things existing in this respect in the universities of Holland, Germany, and France, and we shall at once be astonished, and even surprised, to imagine how we (the English Bar) as a body (supposed to be learned) can have remained so long contented with a system which offers no guarantee for the privileges it bestows, and where fortune, and family too often usurp the place of talent and learning! Such is not the case, however, in the countries above mentioned. There no distinction, rank, or privilege, is to be obtained by the legal aspirant but by long and arduous study; and whatever position the student holds, or may afterwards hold, whatever may be the ultimate title affixed to his name, he owes it entirely to his own merit, and may fearlessly assert that he has fully earned it."

Now it seems clear that a test of fitness, such as above alluded to, *can* only be satisfactorily and conveniently applied by a two-fold examination—the one, for ascertaining what amount of general knowledge is possessed, to be submitted to by every applicant for admission as a student at an Inn of Court, such applicant not having obtained a university degree; the other ordeal to be passed prior to soliciting and receiving, from such body as shall be competent to bestow it, the degree of barrister. And here, rather than bringing forward arguments in support of the plan of examination just indicated, let us consider the

[1] See the Preface to the "History of the French Bar," by Robert Jones, Esq., Barrister-at-Law.

objections urged against it: in doing so we shall be enabled, without any risk of repetition, at once to state and vindicate our own views. Turning, then, in the first place, to the evidence of a learned Queen's Counsel of more than thirty years' professional experience, we find the following opinions expressed:—1. That there should not be any examination preparatory to the admission of a student, and that classical knowledge should not be deemed a necessary qualification for admission to the Bar; for "why should a man who never opened a Greek or Latin book not be a lawyer? Many men have risen to great eminence in the profession who never knew Latin or Greek." 2. That an examination preliminary to a call to the Bar is undesirable, inasmuch as it would have the effect of shutting out all that class of persons who now desiderate merely the name and degree of barrister. 3. That it is not of much consequence if it be left entirely to a man's own choice whether, when he comes to the Bar, he be fitted to discharge the duties of a barrister; for "if he is not qualified, he will get no business,—and if he is qualified, he will get business. And it must be considered that the question is not solely as to a man being a lawyer, that is, well read in law. Some of the very best and first advocates at the English Bar were no lawyers—they were very ignorant of law. The profession must be looked at not as a mere profession of jurisconsult to advise. The Inns of Court are rather considered as places where people are educated to be advocates." And, lastly, in answer to the question, "Do you think that the members of the English Bar are upon the whole as well educated as they ought to be in their own profession?" the answer accorded by the witness, to whose evidence we would first call attention, is this: "I should say that they are; I should say that they are as well educated as you can expect men to be, taking them as a mass." Now from the views thus expressed in words, which we have transcribed, or of which the substance has been given with scrupulous accuracy, we take leave totally and diametrically to differ. True it is, there have been great lawyers who were bad classical scholars; and so there have been great statesmen and great parliamentary speakers; and yet would any one deny that something more even than moderate proficiency in the dead

languages—something more even than a mere capacity of translating Greek and Latin—would facilitate the attainment of distinction as an orator, or lend force and dignity to the effusions of the statesman? We always had supposed until this moment—we always had clung to the belief—that familiarity with the works of Demosthenes, of Cicero, of Horace, might do more than aught else to give nervous energy to the declaimer, grace and elegance to the didactic speaker, or polish to the rough and rugged sentences of the would-be rhetorician. But all this is wrong, and we now learn that although the Inns of Court are places "where people are educated to be *advocates*," rather than lawyers or profound jurists, it is *not* incumbent on those institutions by any—the slightest—test to satisfy themselves that such moderate acquaintance with classical literature has been imbibed by the applicant for enrolment amongst their *alumni*, as may qualify him for the higher walks of advocacy, or for any arena more distinguished than the Court of Quarter Sessions, or, perchance, the C. C. C.

Fortunately, however, we need not restrict ourselves to barely speculating as to the probable result of instituting an examination such as we are now speaking of: it has been tried at the Inner Temple, and, according to the evidence of the treasurer of that learned society, "was most beneficial." Having been ourselves subjected to it, we can vouch for the fact that it was sufficient for the object proposed to be effected by it, viz., the eliciting whether or not "a competent knowledge of Latin and Greek" was possessed by the examined; and if for Greek be substituted English history, in accordance with the recommendation of the commissioners in the report before us, we think that one main end to which their attention has been directed—that of excluding from the rank of barrister the grossly ignorant and unlettered, without at the same time deterring from the profession those who are but moderately endowed—will be fully and satisfactorily achieved.

In regard to the question—yet more important than the preceding—should there be a compulsory examination prior to being called to the Bar, the argument of those adverse to it, that a great advocate may be "very ignorant of law," *ergo*, that

the means of obtaining legal knowledge need not be provided by the Inns of Court, seems to us most impotent and lame. We scarce know, indeed, how to grapple seriously with such reasoning, save by denying, as we most conscientiously and unhesitatingly do, that "a *great* advocate may be *very ignorant* of law,"—an assertion which seems to us unmeaning, unless 'explained away' in some such fashion as the following:—That one possessed of fluency of speech and proficient in the arts of advocacy, if endowed with very moderate legal knowledge, will oftentimes at Nisi Prius be far more serviceable to his client than the profound pleader or "case" lawyer. Granted; but what chance would the advocate thus sparingly gifted have in competition with one who to fluency or eloquence united sound knowledge of the law? How low a view does he take of the *status* and dignity of barrister who is content to shuffle through his work with such dubious success as may be attainable by mere fluency of tongue, adroitness, mayhap, in the stating and marshalling of facts, and an *ad captandum* manner with the jury! Far different from this should be the aim—far higher than this, as we opine, should be the ambition of the law student—far other the object which our learned societies should keep before them whilst educating youth.

Let us now pause for a moment to weigh and ponder an assertion which seems to us to be founded in fallacy; or, if true, to furnish no ground whatsoever for the deduction attempted to be drawn from it. Is it indeed true, that an examination framed with a view to determining whether the examined is moderately well versed in classics, or even in Greek, Latin, and English history, would have the effect of deterring from the Bar those who desiderate merely the *status* and degree of barrister? Is it indeed true, that young men, usually belonging to the middle and higher classes of society, will shrink from submitting themselves to an examination, whether of the kind now suggested by the commissioners, or such as was once deemed requisite by the Society of the Inner Temple? Can it be that any one fresh from a university or public school, capable of appreciating, and looking at, as no mean or undesirable object, admission to the Bar, would be thus

scared from the prosecution of his scheme? This is a grave question; and we should blush for our educational institutions—blush for the land which gave us birth—for the generation of which, in this nineteenth century, here, in the most famous and imperial of cities, we form a component, though insignificant, unit—could we hesitate in responding to the query here proferred by a positive and uncompromising negative. What! are we to be told that in the land of Bacon, of Coke, of Pitt, of Murray, of Hallam, and Macaulay—illustrious members of a profession to which we had once fondly deemed it an honour to belong—the possession of knowledge is so rare, so lightly valued, and so little prized, that many there are, of such as might reasonably be expected to become aspirants for legal distinctions, or at all events for admission to the Bar, ignorant at the age of manhood of those rudiments of learning, on having acquired which the merest scholastic tyro in the worst-conducted of our public grammar-schools would have no cause especially to plume himself. Should this really be so, however—should it be that many men thus deplorably ignorant are in truth likely to be diverted from the Bar by instituting a preliminary examination of the kind and according to the plan proposed—let us inquire what results to the community at large, whether prejudicial or otherwise, would be likely thence to flow? Now, the answer to this question may, as we conceive, correctly and conveniently be arrived at by, in the first place, resolving another. What object may a man thus illiterate and unaccomplished propose to himself in going to the Bar? We answer, unhesitatingly, that of obtaining the *positive* advantage (such as it is) of the name and degree of barrister, together with such *contingent* advantages as the pardonable but unscrupulous partiality of friends in power may, *favente fortunâ*, confer or render possible. If this be so, *cadit quæstio*, the argument is over—the strife of disputants may cease, and the public will arbitrate, we doubt not in what manner, as between them.

Upon the points to which we have just adverted, let us, nevertheless, hear what the commissioners have to say. "Some of the witnesses," they remark, "appear to entertain apprehensions lest a compulsory test should tend to exclude from the

Bar that class of persons who proceed to it, not with a view to professional practice, but with the intention of becoming members of Parliament or magistrates. We should regret such a result; but we do not share in the apprehensions. It must be admitted that to this class of persons the knowledge of some portions of the science of law, especially constitutional law and legal history, jurisprudence, and international law, and of some portions of the professional branches of law, as criminal law and the law of evidence—would be highly valuable. It is not found that examinations for degrees discourage those persons to whom a degree is of no practical value in after-life from going to the universities, and completing their course of education there. And we conceive that the opportunities of obtaining a better education than is at present offered in scientific and practical branches of the law, which may be especially useful to the legislator or the magistrate, *may not only counteract the possible fear of examination, but may induce a large number of young men of that class to prepare themselves for the Bar.* Those who may be unwilling to submit to any examination, can have little reason to complain if they are not allowed to assume the position of members of a learned profession; and we are not prepared to say that either the former system of dining a certain number of days in hall, or the present additional requirement of sitting a certain number of hours in a lecture-room, should be accepted as sufficient qualifications for that position." We leave the question thus tersely discussed and argued by the commissioners, with confidence, to the judgment of the community.

In regard to the last of the four positions assumed by the witness whose evidence we are considering, viz., that English barristers, taking them in the aggregate, are as well educated as they ought to be, we would only observe, that the higher the standard of intellectual attainments—of proficiency in technical and general knowledge—required in the barrister, *the better will it be for the public, for the Profession, for himself.* Law is a science demanding from her votaries no mediocre intelligence—no *modicum* or mere smattering of knowledge—no lax or *dilettante* method of pursuit and study. "*Certe quidem,*" remarks

Coke in his quaint latinity, "*lectionem, auditionem, congressus meditationem, recordationem, omnia hæc et singula fateor ad legum nostrarum cognitionem requiri, utpote quæ ex tot tamque infinitis prope particularibus consistit.*" And further, as remarked by the same author:—"*Jam si quæratur quæ artes et scientiæ necessariæ sint ad istarum legum cognitionem atque intelligentiam, respondeo quod quando quidem jurisprudentia hæc desinit ac statuit, de aliis, non solum humanis legibus, verum artibus et scientiis universis, profecto earum cujuslibet cognitionem a juris nostri professore, non modo non excludo, sed utilem prorsus atque necessariam judico.*" To which we may add, that for the formation of an accomplished lawyer, much—very much—is now needed beyond what Coke in his most enthusiastic moments would have contended for, or could have imagined—much and substantial information touching each and every of various leading departments of science.

"With regard to a knowledge of the law," observes one of the most eminent of the witnesses who gave evidence before the commissioners, "it is very important that country gentlemen and many others, not only persons intending to be magistrates, but persons in general in the station of gentlemen, should have some knowledge of the law." And yet, though few, perhaps, might be found hardy enough to dispute this dictum, it is seriously contended that those who look forward to being regularly enrolled amongst lawyers, and in name, at all events, to be such, may dispense altogether with a legal education, and plunge, if so minded, *in medias res*, without aught of preliminary preparation. This seems to us passing strange; and we should rest uneasily in the belief, notwithstanding the positive assurance before adverted to, that "the English Bar is at the present day as well educated as it ought to be."

Turning aside from any further prosecution of the irksome and ungracious task of combating objections to the spread and advancement of legal knowledge, which, however conscientiously put forward, appear to us illiberal and narrow-minded, let us apply ourselves to analyzing the Report of the Commissioners appointed "to inquire into the arrangements of the Inns of Court for promoting the study of the law and jurisprudence,

the revenues properly applicable, and the means most likely to secure a systematic and sound education of students of law, and provide satisfactory tests of fitness for admission to the Bar." Now, with regard to the earlier portion of this report, which has reference to the revenues, the outgoings, and generally to the pecuniary position and net income of the four Inns, we have very little to say, having been always amongst those who believed that the wealth and annual revenues of the Inns of Court had been grossly exaggerated in the public prints. We are not surprised to learn that the Inns of Court can do little or nothing beyond what they have heretofore done and are still doing towards promoting, by pecuniary contributions, or facilitating the spread of legal education. Accepting this statement as correct, we are as little discouraged as we are surprised by it: "For if," as remarked by the commissioners, "in consequence of any falling off in the income of the Inns of Court, they should find themselves unable to contribute to legal education more than their present limited contributions, the requisite resources for carrying into effect the plan of education suggested" in the report "might be obtained by a moderate additional fee on the students, which, as directly applicable to the promotion of their education, could not be objected to." To some of our readers it may not perhaps be known that the only compulsory fee exacted from a student towards maintaining the system of education now in force is 5*l.* 5*s.*, payable upon admission at his Inn. Besides this, an annual payment of 3*l.* 3*s.* will entitle him to attend at all the private classes throughout the educational year; such attendance, and consequently such last-specified payment, being wholly voluntary on his part. This being so, we quite agree with the commissioners that no hardship would be entailed on students if called upon to contribute somewhat more liberally than at present towards the expenses necessarily attendant on the lectures, the classes, the examinations. Nay, we have heard, and believe it to be true, that the Committee of the Benchers, originally appointed to prepare a scheme of legal education, in accordance with whose suggestions the system actually in force was organized and founded, were, with the exception of one distin-

guished individual, unanimously in favour of recommending that the amount to be paid by each student, on being admitted a member of his Inn, should be precisely double of that wherein he is now mulcted. If this rumour be not unfounded, it seems improbable that any serious objection will hereafter be raised, amongst those on whom may devolve the task of definitively arranging details, to increasing, as the exigencies of the Inns of Court may dictate, the admission fee payable by each student.

Believing, then, that funds, ample in amount, will readily be forthcoming for the carrying out fully and efficiently of the plan suggested by the commissioners, we will proceed to exhibit and trace out briefly its leading features. In maturing and developing their scheme, the commissioners have had in mind and been mainly influenced by two considerations: "1st. The duty which the several societies, to whom the power of calling students to the Bar has been confided, owe to the students: 2nd. The duty which they owe to the community, whilst conferring on certain selected individuals a peculiar position, and attendant privileges" (Rep. p. 13). The commissioners are of opinion that, for the efficient discharge of these duties, there should be a combined action by the several Inns of Court,—a system common to them all,—"for testing the *general* knowledge of persons to be admitted as students, and the *legal* knowledge to be required as a condition for the call to the Bar." With this view, they propose that the four Inns should be united in a university, still preserving their independence respectively as distinct societies with regard to their property and internal arrangements; that there should be established a preliminary examination for admission to the Inns of Court of persons *who have not taken a university degree;* and that there should be examinations, the passing of which shall be requisite for the call to the Bar; that the conduct of these examinations and the conferring of degrees shall be intrusted to the university, composed of a chancellor, barristers, and masters of laws; that a senate shall be elected in part by the benchers and in part by the barristers, in whom, together with the chancellor, shall be vested the government of the university. The subse-

quent suggestions of the commissioners, which we print verbatim, are as under:—

"10. That there shall be—first, a preliminary examination of candidates for admission as students at the Inns of Court; second, an examination in law of students desirous of being called to the Bar, or taking a degree of Master in Laws. That there shall be two of each of such examinations respectively held every year, the one shortly before Michaelmas Term, and the other shortly before Easter Term.

"11. That no person shall be examined for admission as a student at an Inn of Court unless he shall produce his conditional admission by the Inn, subject only to his passing such examination.

"12. To pass such preliminary examination, such persons must possess a competent knowledge of English history and Latin.

"13. No person shall be admitted as a student into any Inn of Court unless he shall have passed the preliminary examination, or have obtained the degree of a Bachelor of Arts, or Inceptor, or Bachelor in Law, at some university within the British dominions.

"14. The subjects for the examination of students desirous of being called to the Bar, or of taking a degree in laws, shall be divided into two branches, consisting of the following subjects:—First branch: (*a*), Constitutional Law and Legal History; (*b*), Jurisprudence; (*c*), the Roman Civil Law. Second branch: (*a*), Common Law; (*b*), Equity; (*c*), the Law of Real Property.

"15. That no person shall be called to the Bar unless he shall receive a certificate from the Senate of having passed a satisfactory examination in at least one subject in each of the above branches.

"16. That students may present themselves as candidates for honours at the examination in such branches, and if they shall be deemed by the examiners to have passed a creditable examination in all the subjects of either branch, they shall be entitled to a certificate of honour in respect of such examination; and if they shall have passed a like examination in all the subjects of both branches, they shall be entitled to the degree of Master of Laws. The Senate to make regulations in respect of the classification of the students for honours.

"17. That at each examination a studentship of fifty guineas per annum, to be held for four years, be awarded to the Master in Laws who shall have passed the best examination.

"18. That all persons desirous of being called to the Bar, and all candidates for honours, other than candidates for the studentship, may, as they think fit, pass their examination in each branch, either at the same time, or at separate times; but the candidates for the studentship must be examined in both branches at the same time.

"19. That the examiners be appointed by the Senate.

"20. That readers be appointed, as at present, by the Inns of Court, the Senate appointing the fifth reader, now appointed by the Council of Legal Education, with power for each bench (if it think

fit), subject to the approbation of the Senate, or for the Senate, on the joint application of all the benches of all the Inns, to appoint additional readers.

"21. The Inns of Court not to be compelled to call to the Bar those who shall have passed an examination, but to retain their present powers with reference to the calling of students to the Bar, and the disbarring of persons after their call, subject to the appeal to the judges."

The commissioners conclude their very able and admirably-drawn report with the following important suggestion, which we trust may meet with due attention:—"We would venture to suggest, in conclusion, that the several universities of the realm will, in our judgment, co-operate more effectually in advancing legal education by a sound and liberal training for the students intending afterwards to enter upon the profession of the law—a training limited, in respect to that study, to general principles—than by increasing the amount of special instruction which the Inns of Court should properly supply. We feel assured, that there is no more important part of the solid preparation for entering upon any of the learned professions than the discipline and the cultivation of an enlightened university education; and, looking to the increased facility of such preparation, and the probable effect of the improved system in the Inns of Court, which we humbly recommend for their adoption, we anticipate with hope and confidence the maintenance of an educated and enlightened Bar, upon whose integrity, independence, and learning the pure administration of justice, and the security of civil society, must, under the blessing of Divine Providence, largely and permanently depend."

Such are the suggestions contained in the report before us for the advancement of sound legal education, for the insuring and facilitating of the acquisition of professional knowledge, and generally for raising and elevating the intellectual *status* of the advocate,—a legal university, an organized system of examinations, lectures, such as are now given, adapted for strict mental training, for fixing in the mind a knowledge of principles, for instructing in regard to the choice of books, and the *method* of studying the law. Postponing, for future consideration, some of the details of the scheme before us, of which, in the main, we

most cordially and unhesitatingly approve—deferring, until we are in a position to know whether *anything* is at present likely to be done, the examination of some minor details—we have, at this moment, but one or two additional observations to offer in connection with the Report before us. The fallacies which seem to us apparent in the reasoning of those who are opposed to any attempt at spreading legal education, are of this kind:—That the willing and competent student will study efficiently unaided; that "tests as to knowledge of the law in any branch are inexpedient, and are likely to be fallacious;"[1] that there will always be a sufficient number of good lawyers at the Bar, and that attorneys and solicitors can readily enough discriminate between the good and the bad; that the great end which should be looked to during the period of study is the acquiring, in the least possible space of time, and at the least possible expense, such an amount of knowledge as may qualify for somehow getting through the business, not ordinarily very onerous, nor entailing great responsibility, which the fledgling barrister may enjoy. That these fallacies result from the fact that too low an estimate has been formed by those who put them forward of the estate and degree of barrister, is palpable and demonstrable. The various questions which have been raised between the opponents of the Report and its supporters, seem accordingly to be reduced to an issue, single and intelligible. Is the profession of the law to be sunk into a mere trade? Is the be-all and the end-all of that trade to be self-aggrandisement, or rather self-enrichment? Heaven forbid—we say it reverently and advisedly—that an aptitude for money-getting should be mainly looked to as a qualification for the Bar by those who may be hereafter delegated to promote or superintend the system of legal education in this country. Heaven forbid that a profession, heretofore esteemed liberal, should thus far be desecrated and rendered vile. If this should be so, many, as we conceive, will cast aside the forensic mantle, letting it descend, uncared for and dishonourable, upon the shoulders of the mere pelf-seeker or pettifogger. We look, however, steadfastly and undoubtingly, for better things; we look hopefully for the

[1] See the evidence of Sir Fitzroy Kelly, Q.C., M.P., Report, p. 87.

coming of that time when the Bar of England shall rank as high, regard being had to its repute for sound learning and accomplishments, as we firmly believe that it now does for genuine honesty and integrity of conduct. That such result will be brought about by the establishment of a legal university in this metropolis, we venture with confidence to predict.

Art. VII.—THE HILARY TERM EXAMINATION PAPERS.

ON the 8th, 9th, and 10th days of January last took place, at Lincoln's Inn, the Public Examination of Students of the Inns of Court, being candidates either for a certificate, preliminary to being called to the Bar, or for the Studentship (of fifty guineas per annum tenable for three years), or for honours. The nature and mode of conducting this examination were explained on a former occasion;[1] its subjects appear from the following programme:—

The Reader on Constitutional Law and Legal History proposes to examine on the following subjects:—

He will expect the candidates for honours in the ensuing examination to have mastered the chapters in Hallam's Constitutional History, which contain the reigns of the House of Stuart, of Queen Anne, and of George I. and George II.; the chapter on Treason in Foster's Crown Law; the chapter in Stephen's Blackstone on the same subject; the History of our Testamentary Law; the volumes of Rapin and Tindal's Continuation during the same reigns.

He will also expect them to be well acquainted with the State Trials during that period.

He will expect the candidates for a Pass to answer any general

[1] See the *Law Magazine* for August, 1855.

question on the leading facts in English History, to be well acquainted with the 11th, 12th, and 16th chapters of Hallam's Constitutional History, and with the trials of Russell, Sydney, and Lord Delamere.

The Reader on Equity proposes to examine in the following books :—

1. Smith's Manual of Equity Jurisprudence; Mitford on the Pleadings in the Court of Chancery. Introduction :—Chapter 1, sec. 1 and 2; chapter 2, sec. 2, part 1 (the first three pages); chapter 2, sec. 2, part 2 (the first two pages); chapter 2, sec. 2, part 3; chapter 3. The Act for the Improvement of the Jurisdiction of Equity, 15 & 16 Vict. c. 86.

2. The Cases and Notes contained in the first volume of White and Tudor's Leading Cases, and the Cases of Aldrich *v.* Cooper, and Rees *v.* Berrington, with the Notes to those Cases in the second volume.

Candidates for certificates of fitness to be called to the Bar will be expected to be well acquainted with the books mentioned in the first of the above classes.

Candidates for the studentship or honours will be examined in the books mentioned in the two classes.

The Reader on the Law of Real Property proposes to examine in the following books and subjects :—

1. Williams, Real Property; Sugden, Powers, vol. i.; Butler's Notes to Co. Lit. 191*a*, ss. 2, 5; 271*b*.

2. Cruise, *Dig. tit.* xvi., "Remainders."

3. Title by Non-Claim; 2 & 3 Wm. 4, c. 71; 3 & 4 Wm. 4, c. 27.

4. The Law of Covenants, in its relation to Real Property; Spencer's Case, 1 Smith, Lead. Cas., 26; Tulk *v.* Moxhay, 2 Ph. 774.

5. The Law of Settlement, with reference to Ante-nuptial and Post-nuptial Settlements.

Candidates for honours will be examined in all the foregoing books and subjects. Candidates for a certificate will be examined in those mentioned in parts 1, 2, and 3.

The Reader on Jurisprudence and the Civil Law proposes to examine candidates for honours in the following books and subjects:—

1. The Elements of the Roman Law of Testaments and Legacies as contained in "Institutiones Juris Romani Privati" of Warnkönig.

2. Wheaton's Elements of International Law. Vol. 2, chap. iii. on Neutral Rights, and chap. iv. on Treaties.

3. Lindley's Introduction to the Study of Jurisprudence. Chap. iii. on "The Objects of Rights and Duties." (The text of Thibaut as translated by Lindley, and the Notes of the translator in the Appendix.)

Candidates for a pass certificate will be examined in—

1. Sanders's Institutes of Justinian. Book 2.

2. Wheaton's International Law. Vol. 2, chap. iv.

The Reader on Common Law proposes to examine in the following subjects:—

Candidates for a certificate will be examined in—

1. The Introduction to Blackstone's Commentaries, sections 2 and 3.

2. The 4th and 17th sections of the Statute of Frauds, as commented on and illustrated by Mr. Smith in his Lectures on Contracts, 2nd ed. pp. 37-78.

3. The Law of Simple Larceny (which may be read from Archbold, Criminal Pleadings, 12th ed., or any other recent treatise on Criminal Law).

4. Candidates for a certificate will also be expected to answer any question having reference to the ordinary proceedings in an action at law.

Candidates for the studentship or honours will be examined in the foregoing subjects, and also in—

5. The undermentioned cases:—

The Six Carpenters' Case, 8 Rep. 146, in connection with which should be read Tharpe *v.* Stallwood, 5 M. & Gr. 760.

Pinnel's Case, 5 Rep. 117, with which should be read Sibree *v.* Tripp, 15 M. & W. 23, and Cooper *v.* Parker, 14 C. B. 118.

Ashby *v.* White, 1 Smith, L. C., 105, with the Note thereto.

6. Taylor on Evidence, 2nd ed. vol. 1, part 2, chapters vii., xi.-xv. inclusive (of Hearsay Evidence and some of the leading exceptions to the rule excluding it).

Having reference to the books and subjects above indicated, the following questions were proposed:—

Questions on Constitutional Law and Legal History.

1. What was the legal condition of the press until the reign of Queen Anne?

2. What means did Charles II. take to gain an influence in Parliament?

3. In what did the unconstitutional conduct of the ministers of Charles II. differ from the encroachments on the Constitution in the reign of James and Charles I.?

4. What was Bushel's case?

5. Give an account of the trial of College.

6. What were the guarantees of constitutional right at the close of the reign of Charles II.?

7. What was the condition of those who dissented from the Established Church at the Revolution?

8. What change took place in the law of treason between the trial of Lord Russell and the accession of George I.?

9. What change took place in our Constitution during the reign of George I.?

10. What was the Peerage Bill of Lord Sunderland?

11. What Act was it the purpose of James II. to repeal?

12. What was the conduct of James II. with regard to toleration?

13. What was the case of Sir John Fenwick?

14. What attempts were made by William III. to extend the principle of toleration?

15. Give an account of the case of Damaree and Purchase, and the doctrine it established, with Mr. Justice Foster's remarks upon it.

16. Give an account of the Act of Settlement.

17. What measures were taken to make the judges independent?

18. Give an account of Lord Russell's trial.

19. What was the case of Sir Thomas Armstrong?

20. What proceedings were taken against Bishop Atterbury, and on what grounds?

Equity.

1. Explain and illustrate the maxim,—Equity follows the law.

2. In what cases will the Court of Chancery decree specific performance of an agreement for the sale of personalty?

3. State the principal parts of which a bill in Equity is composed. In what manner is a defendant informed that he is required to appear to the bill?

4. What is the object of putting in a plea to the whole bill, and what is the defence proper for a plea?

5. Who are considered wards of the Court of Chancery?

6. In what cases will real estate belonging to a partnership be considered as converted into personalty?

7. A purchases a share in a ship, but the share is registered in the name of B; B threatens to sell the share for his own benefit. Has A any and what remedy?

8. Will a Court of Equity in general grant relief when an accident affecting the subject-matter of an agreement has occurred, which is neither provided for by the agreement, nor, apparently, was in the contemplation of the parties when they entered into the agreement? Illustrate your opinion by an example.

9. By a post-nuptial settlement one not indebted at the time conveys freehold, and covenants to surrender copyhold land to trustees upon trusts for the benefit of his children. They, after his decease, institute a suit for the purpose of having the trusts of the settlement carried into execution. Are they entitled to any and what relief?

10. Under what circumstance will a purchase by a solicitor from his client be supported in Equity?

11. A sells and conveys an estate to B, but does not receive the whole of the purchase-money: a judgment creditor of B extends the land under an *elegit*. Has A any and what remedy in respect of the land?

12. In what cases will the Court of Chancery decree the cancellation of an instrument which is void at law?

13. A person indebted to various creditors conveys property to trustees upon trust for sale and with the proceeds thence arising to pay the creditors, the names of the creditors being set forth in the deed; the trustees sell the property and are then required by the debtor to hand over the proceeds to him, instead of applying them according to the trusts of the deed. The trustees comply with this request, and afterwards the creditors discover the existence of the trust deed. Are they entitled to any relief against the trustees?

14. Articles are entered into previously to marriage, by which it is agreed that lands shall be settled on the husband for life, with remainder to the heirs of his body. After the marriage a settlement, which follows the words of the articles, is executed. To what estate is the eldest son of the marriage entitled in Equity?

15. For what *quasi* debts of a *feme coverte* can her separate estate be made liable?

16. A testator dies indebted on bond and simple contract: part of his real estate he devises charged with the payment of debts, and the rest descends to his heir. The personal estate and descended real estate are sufficient to pay one-half of the bond debts only. The remainder of the bond debts and the simple contract debts together exceed the value of the devised estate. In what manner shall the proceeds arising from the sale of that estate be distributed?

17. What circumstances are essential in order that a gift may be a good *donatio mortis causâ?*

18. Upon what principle has the jurisdiction of the Court to determine a question respecting a disputed boundary between two provinces in America been supported?

19. B takes a transfer of a mortgage debt and security from A the original mortgagee, paying a sum less in amount than the

original mortgage debt. B files a bill of foreclosure. For what sum will a person interested in the equity of redemption, or having a charge on the estate subsequent to that of A, be in general entitled to redeem? Are there any and what exceptions to the rule?

On the Common Law.

1. State the principal component elements of our Common Law, and whence, according to Blackstone, it is derived.

2. Explain what is meant by saying that a custom must have been "continued," and must be "reasonable" and "certain."

3. Does our Constitution recognise the maxim—*ejus est interpretari cujus est condere?*

4. Mention some leading rules for construing Acts of Parliament.

5. What object had the Legislature in view in passing the Statute of Frauds?

6. What points were decided with reference to sec. 4 of the above Statute in Wain *v.* Warlters, 5 East, 10, and Boydell v. Drummond, 11 East, 142?

7. How does an "acceptance" differ from an "actual receipt" of goods under the Statute of Frauds, sec. 17?

8. Under what circumstances may a right of action be said to "merge" in a felony?

9. Illustrate the maxim—*Sic utere tuo ut alienum non lædas.*

10. On what grounds is hearsay evidence in general inadmissible?

11. What was the point decided in Doe *d.* Tatham *v.* Wright (7 Ad. & E. 313, S. C. 5 Cl. & Fin. 670) as to the admissibility in evidence of letters addressed to a person whose sanity was in question?

12. Give a definition of simple larceny, exhibiting the essential ingredients in this offence.

13. Distinguish between a "taking" and an "asportation" in connection with simple larceny.

14. Within what time must a defendant demur to the plaintiff's declaration?

15. What is the rule as to joinder of causes of action in the same suit?

16. Where, and within what time, may the writ of summons in an action be served?

17. Specify various things whereof larceny cannot be committed at Common Law.

18. State shortly the restrictions subject to which an oral confession of crime is receivable in evidence.

19. What are the ordinary writs of execution in a personal action?

20. Enumerate some of the more important legal rules and doctrines which you consider referable to the customary or unwritten law.

21. What was the principal point decided in Sibree *v.* Tripp (15 M. & W. 23)?

22. Is it in your opinion necessary to show a taking *lucri causâ*, in order to sustain an indictment for larceny? Cite cases bearing upon this point.

On the Law of Real Property, &c.

1. Explain the nature of a bargain and sale before and after the Statute of Uses. A bargains and sells to B to the use of C; who takes the legal estate?

2. When are hereditaments said to lie in *grant*, and when in *livery*? Has there been any alteration made in this respect by recent legislation?

3. Explain the meaning of a Common Law power, and one operating under the Statute of Uses.

4. Distinguish between a remainder and a reversion. Does the heir of the settlor take by purchase or descent under a limitation to A for life, remainder to the right heirs of the settlor?

5. What act on the part of a tenant for life, who has a power of leasing in possession, will have the effect of suspending or extinguishing the power?

6. A term of years is to be assigned to A for life, remainder to B absolutely. How should the assignment be framed so as to make the limitation to B valid?

7. An estate is limited to such uses as A (a married woman) shall appoint, and in default of appointment to A in fee.

A appoints to a purchaser, without the concurrence of her husband, and without acknowledging the deed. Is the purchaser's title good? Give the reasons for your answer.

8. "A contingent remainder of an estate of freehold cannot be supported by an estate for years." What is the reason for this rule? By what means were contingent remainders destructible under the old law? and what is the recent statutory alteration on this subject?

9. Define an executory devise. In a devise (made previous to the 1 Vict. c. 26) to A and his heirs, and if he die without issue, living B, to B and his heirs—what estates do A and B respectively take?

10. A is tenant in tail, with immediate reversion to himself in fee. What was formerly the effect of a fine levied, or a recovery suffered, by A? Is the law altered in this respect by the 3 & 4 Wm. 4, c. 74?

11. Give an account of the modifications of landed property which were introduced by the Statute of Uses, contrary to the rules of the Common Law.

12. To what extent has the power of alienating contingent and executory interests been enlarged by statute?

13. What were the reasons which led to the introduction of the rule against perpetuities? Is the rule confined to limitations of real estate?

14. How, and within what period, must a mortgagor proceed against the mortgagee in possession for the recovery of the land mortgaged?

15. Set out the usual limitations in a conveyance to uses to bar dower, and explain fully their effect.

16. What are the covenants for title usually entered into by the vendor of an estate in fee simple? and against whose acts is he expected to covenant?

17. Explain the reasons for introducing into settlements the limitation to trustees to preserve contingent remainders. Is the limitation of equal importance at the present day?

18. Distinguish between profits *à prendre* and easements. For what period must a vendor prove uninterrupted enjoyment,

in order to show a title to either kind of property, under the 2 & 3 Wm. 4, c. 71?

19. Was any fixed period prescribed, previous to the late Statute of Limitations, for bringing a suit in Equity? Has the Act introduced any alteration?

20. A seised in fee, sells a portion of his estate to B, and covenants to produce the title-deeds. A afterwards sells the residue of the estate to C, and hands over the deeds to him. Has a purchaser claiming under B, any and what right at law or in equity, as against A or C, to compel the production of the deeds?

Jurisprudence and the Civil Law.

1. Define a universal succession, and give examples of such a succession from English and Roman law.

2. Is testamentary or intestate succession the more ancient institution? Support your answer by proof.

3. Define *hæreditas, testamentum, legatum* and *fidei-commissum*. What were the criteria of the Roman Law for detecting *fidei-commissa?* Have these criteria been borrowed by English Courts of Equity?

4. State shortly the provisions of the Roman Law respecting the *witnessing, signing* and *sealing* of wills. What was the original object of the formality of sealing?

5. What was the leading rule of Roman Law respecting *illegal* conditions in wills? Are you able to state briefly why the difficulty in the recent case of Egerton *v.* Brownlow could never have arisen under Roman Law?

6. What securities did the Roman Law offer the heir against the exhaustion of the assets by legatees? What was the policy of the law in providing these securities?

7. To what extent did the Roman Law prohibit the disinherison of children? Were these prohibitions more or less extensive, on the whole, than those of the Code Napoleon?

8. Was there any rule against perpetuities in Roman Law? If an attempt were made to create a perpetuity, in what way would it be made?

9. Under what circumstances was a legacy *adeemed* in Roman Law?

10. What was the position of a *legatarius partiarius* as regards his liability to contribute to the payment of debts?

11. What is the difference between a condition and a mode? What is the meaning of the rule "*dies incertus conditionem facit in testamento?*"

12. What are the Roman equivalents for the following expressions—*Condition precedent, condition subsequent, specific legacy, general legacy, satisfaction of debt by legacy?*

13. Distinguish between vulgar, pupillar, and quasi-pupillar substitutions. What is meant by the proposition that a pupillar substitution involves a double will?

14. Explain the dictum of Thibaut, that "the object of rights and duties is neither a person nor a thing, and can only be a transaction or event."

15. State concisely the general rules in which English and Roman Law agree respecting the *degree* of care which a person is bound to bestow in cases where negligence may be imputed to him.

16. What is the difference of opinion between jurists as to the proper mode of calculating discount? Which mode do you conceive the Roman Law to sanction? Which is practically followed in commercial transactions in England?

17. In what respect is the English Order in Council of 1795 considered by Mr. Wheaton to diverge from the current practice on the subject of contraband of war? What is the practice of the existing war as respects the point in question?

18. What is the effect of a treaty of peace on claims founded upon debts contracted or injuries inflicted previously to the war?

19. When, on the conclusion of a peace, things are stipulated to be restored to one of the late belligerents, in what state must they be restored?

General Paper.

1. Give an account of the differences between Whig and Tory, illustrated from history, on the accession of George I.

2. Give an account of the attempts made to stop the influence

acquired over the House of Commons by the Crown down to the reign of George III.

3. Give an account of general warrants, the discussions to which they gave rise, the grounds on which they were defended, and the manner in which the contest concerning them terminated.

4. A testator directs a sum of money to be laid out by trustees in the purchase of lands to be held upon trust for his wife for life, with remainder to his son and the heirs of the son's body, with remainder in default of the son's issue to a charity. The son dies an infant in the lifetime of the wife. To whom does an estate belong which has been purchased by the trustees in the wife's lifetime with the money in question?

5. A principal releases one of the several co-sureties. Are the others released? Is there any distinction between the rules of Law and Equity on this subject?

6. A testator dies indebted to an amount larger than his personal estate, including the *paraphernalia* of his wife, and devises all his real estate to his heir. Is the wife entitled to her *paraphernalia?*

7. Is trespass maintainable by an administrator for acts done after the death of the intestate and before the date of the letters of administration? Explain fully the grounds of your answer.

8. Under what circumstances may the appropriation of lost goods constitute the offence of larceny?

9. What important point connected with the rule as to the admissibility in evidence of entries against interest was decided in Higham *v.* Ridgway, 10 East, 109?

10. A purchases a portion of B's estate in fee simple, and covenants with B that neither he nor his assignees will build upon the land conveyed except in a particular manner. Explain fully the nature and extent of the equitable doctrine which enforces on a purchaser for valuable consideration from A the performance of the covenant. Cite authorities.

11. A man possessed of a sum of stock standing in his own name, and also entitled to a sum of stock standing in the names of trustees, settles both sums on his marriage, in the usual manner. Give an accurate analysis of the form of settlement.

12. Trace the progress of the testamentary power of disposition in this country from the reign of Henry VII. to the present time.

13. When are things *divisible* and *indivisible* in the sense of Roman Law?

14. Give a brief historical sketch of the attempts to introduce into the General International Law the rule of *free ships* making *free goods.*

15. In confederated states, where does the power of alienating portions of the national territory reside?

The result of the Hilary Term examination will be found *post,* amongst the Events of the Quarter.

Art. VIII.—NOTES ON RAILWAY LIABILITIES.

WE propose, from time to time in this Magazine, to jot down, for the benefit of whom it may concern, such brief notes on Railway Liabilities, and the law applicable for determining them, as may be suggested by decided cases, by projected legislation, or by the passing events and casualties of the day, assured that to none of our readers can such a topic, if treated with a view to the discovery of truth, be wholly devoid of interest. We shall not, however,—and may at once avow it—profess to handle this subject altogether technically and scientifically; but shall content ourselves rather with discussing points which seem to demand inquiry, as they may suggest themselves, without regard to their methodical sequence or arrangement; with stating, and where possible resolving, difficulties whether theoretical or practical; and with attempting to elicit from our correspondents matter touching the subject of this article meet for investigation in these pages.

Let us begin, then, with taking a rapid glance at each successively of some few points which may be reckoned, perhaps,

amongst the settled elements of Railway Law, but are, nevertheless, worthy even here of recapitulation.

Besides the common and simple case, treated of by all text writers on the Law of Bailments, of a loss of or an injury to goods sent by railway, other analogous cases also present themselves, in which redress may be had against a railway company acting in their capacity of public carriers. Thus liability may be incurred by *refusing to convey* a passenger or goods, by *unreasonable delay* during the transit, or for a *personal injury* to a passenger.

Now, as regards the liability of a railway company for refusing to take *goods* proffered for conveyance, Dr. Story tells us in his work on Bailments (s. 508), that one of the duties of a common carrier is "to receive and carry *all* goods offered for transportation by any persons whatsoever, upon receiving a suitable hire." "This," he says, "is the result of his public employment as a carrier, and, according to the custom of the realm, if he will not carry for a reasonable compensation, he will, upon a tender of it and refusal of the goods, be liable to an action, unless there be a reasonable ground for the refusal," and provided the goods are such as the carrier publicly professes to carry (Johnson *v.* The Midland Counties Railway Company, 4 Exch. 367). A railway company, then, who, under the permissive powers of their Act have elected to carry on business as common carriers, become liable accordingly in that character, and, *inter alia*, will be bound to carry for reasonable charges, if reasonable charges are tendered to them, and will in general be liable to an action if they refuse (see Pickford *v.* The Grand Junction Railway Company, 10 M. & W. 399; Palmer *v.* The Grand Junction Railway Company, 4 M. & W. 749, 766; Crouch *v.* The London and North-Western Railway Company, 14 C. B. 255).

What has been just said would in principle, we conceive, apply, under ordinary circumstances, to the case where an individual wishing to travel on a particular line of railway, upon tendering his money for a ticket in the usual way, is refused it (see Bennett *v.* The Peninsular and Oriental Steam-boat Company, 6 C. B. 775). Where, however, the passenger pays for

and receives a ticket from the company, such document of course specifies in some sort the journey which he is to take; so that here we have at once presented to us the essential elements of a special contract or agreement, executed on the one side but executory on the other, between the passenger and the company; we have the consideration in the shape of money moving from the passenger, and an undertaking by the company, the precise extent and limits of which are indicated more or less distinctly by the ticket. In such cases, however, certain peculiar facts and circumstances may demand attention, before determining as to the liability of the company for any delay in the conveyance of the passenger. The company cannot, for instance, be expected to attach additional passenger-carriages to a train to convey persons who have taken tickets, if danger would result from so doing; but even then it would seem clearly to be their duty to forward passengers, who may be detained, by the first train which might be dispatched consistently with safety, regard of course being had to the extent of traffic on the line. The remarks just made seem to apply also as regards the right of a passenger by railway to require to be forwarded between intermediate stations during his journey, and to the claim which he may have for compensation, in the shape either of nominal or substantial damages, in the event of his undue detention. Though it may be remarked that a company's bye-laws usually, if not always, expressly provide that at intermediate or roadside stations, passengers will only be booked *conditionally*, that is to say, in case there shall be room in the train for which their places are thus secured (Hodges on Railways, p. 95).

In general, however, where a passenger takes his ticket for a particular journey, the whole question, as between himself and the company, will, under circumstances like the above, resolve itself into this inquiry—*what was the contract between the parties?* as may be seen by looking at the case of The Great Northern Railway Company *v.* Hawcroft, 21 L. J., Q. B. 178.

In determining the liability of a railway company for a bodily injury sustained by a passenger *in transitu*, we may, for the general principle which is to guide us, again refer to Dr. Story's work on Bailments, where he says (sect. 601) that "passenger

carriers are not (like common carriers of goods) insurers against all injuries, except by the act of God, or by public enemies." Their undertaking is not absolutely to convey safely, but it goes to this extent only, that "they and their agents possess competent skill, and that they will use all due care and diligence in the performance of their duty." "A carrier of *goods*," says Mr. Justice Park (in Crofts *v.* Waterhouse, 3 Bing. 319), "is liable in all events, except for the act of God, or of the king's enemies; a carrier of *passengers* is only liable for negligence." The duty cast upon railway companies as passenger carriers will, therefore, be to carry safely those whom they receive as passengers, so far as human care and foresight will go, and they will be liable for the result of any accident arising through negligence (Hodges on Railways, pp. 463-4).

Now, the particular negligence complained of, may of course be shown to have been committed in any case like that last supposed, either by the company as proprietors of the line, in neglecting to maintain it in proper order and repair, or by their engine-drivers or other servants, for whose negligence and unskilfulness they are responsible (this is explained in Hutchinson *v.* The York, Newcastle, and Berwick Railway Company, 6 Railw. Cas. 580). Thus far no serious difficulty presents itself. An interesting question may, however, arise under circumstances of this kind, as to the *quantum* of proof which must be given of negligence in the company. It is clear that there must be *some* such evidence given, or facts proved, which could only, or must at all events *primâ facie*, be considered to have resulted from negligence. The fact, for instance, of a collision between two trains belonging to the same company would probably be considered as some evidence of negligence on their part; and whether the accident arose from the trains running at too short intervals, or from their improper management by the persons in charge of them, or from the servants at the station neglecting to stop the last train in time, the company would be equally liable, so that it would not be incumbent on the plaintiff suing for damages resulting from the accident, to show specifically in what the alleged negligence consisted; but if the accident really arose from some inevitable

fatality, it would be for the company to show it (see Skinner *v.* The London and Brighton Railway Company, 5 Exch. 787). It might, nevertheless, be going too far to say that *the mere happening of an accident* to a traveller by a railway—as by the carriage in which he was seated running off the line—would of itself be *primâ facie* evidence of negligence in the management of the train (see Perren *v.* The Monmouthshire Railway and Canal Company, C. P., 17 Jur. 532; Carpue *v.* The London and Brighton Railway Company, 5 Q.B. 747; Christie *v.* Griggs, 1 Camp. 79; Stoke *v.* Saltonstall, 13 Peters., U.S., R. 181). Upon the points just mooted, the decisions are not altogether conclusive or satisfactory.

But, besides an injury sustained by a railway passenger *in transitu* between two stations, bodily harm may chance to befall him at one of the *termini*, or at one of the intermediate stations, after he has taken his ticket, and thus been brought into privity with the company. In Martin *v.* The Great Northern Railway Company, 16 C.B. 179, the facts appearing in evidence were as follows:—The plaintiff had taken a return-ticket to go by the London and Great Northern Railway Company from London to Barnet and back. He got safely to Barnet, but wishing to return by the train which leaves that place shortly before seven o'clock in the evening, the plaintiff presented himself at the station just as the train was about to start. Being told that he was in time, he passed through the station, which is so constructed that passengers desirous of going to a train on the "up-line" must cross the "down-line," and for this purpose there is at the end of the platform of the "down-line" an inclined plane, at right angles with which is a planked crossing leading to the platform on the other side. When the plaintiff arrived, being in a hurry, and not observing the crossing, but seeing the red lamps of the train at some little distance up the line, he ran straight on, and coming in contact with the handle of a "switch," he fell over it and hurt himself considerably. There was contradictory evidence as to the sufficiency of the light at the station, the plaintiff's witnesses swearing that there was not light enough to enable a person unacquainted with the premises to move about with safety; the defendants' witnesses,

on the other hand, stating that there was ample light throughout the station for all purposes. It was contended on the part of the defendants that the injury which the plaintiff had sustained was *entirely* the result of his negligence and want of care, in going to a part of the railway where he had no business to go; and that if he had gone over, as he ought to have done, by the proper crossing from the "down" to the "up" side of the line, the accident would not have occurred, and therefore that the defendants were not responsible. It was, however, conceded that there was no light at the spot where the "switch" handle stood, and that there was no fence or rail to prevent persons walking down the inclined plane from proceeding onward to that spot.

In directing the jury, in the case just abstracted, as to the legal liability of the company, according as the facts might be ascertained by them, Mr. Justice Maule made some remarks so thoroughly practical and useful respecting the management of railway stations, that we are tempted to present them in a somewhat abbreviated form to our readers:—1st. He remarked that inasmuch as persons by putting off their arrival at the station until the very last moment, often run very great risks, and rush hastily into carriages even when the train is in motion, it is the duty of the company to prevent this particular kind of danger by shutting the door of the station as the train is about to start; in omitting to do which they will, in the opinion of the learned judge, be guilty of negligence. 2ndly. If the company choose to allow people to cross their line at the very last moment before the starting of a train, they should have some one to point out to passengers who are in a hurry the right course for them to take, or else they should have a board placed at the end of the platform with a direction legibly painted on it, "To the train," and a hand upon that board indicating the way which people are to take. 3rdly. A railway station ought, at the time when passengers may lawfully be upon it, to be *sufficiently lighted*, that is to say sufficiently lighted, not merely for those who are conversant with the locality in question, but for strangers. "A much less degree of light," as remarked by Mr. Justice Maule, "will enable a person who is waiting at

a place with which he is familiar to see all about him, and to understand where he is, than would be required to light a person who is waiting at a place of which he has no knowledge. . . . . If you went into a warehouse with which you were familiar, you would see every staircase and turning, or any apparatus there might be about it, with the slightest possible light; but a person who has never been there before, and knows nothing about it, must have a great deal more light to enable him to see his way." We may then infer that railway companies are bound to light their stations, not for their own servants alone, but for those who may never have been there before, and who are in haste; and railway stations should be lighted so as to enable *these latter persons* to see their way.

There can be no doubt that many most serious accidents befall the public, arising out of a sort of extreme economy, or rather niggardliness, on the part of railway companies, and the desire —not, it must be confessed, wholly unnatural in these days of increasing expenditure and diminished dividends—of saving money in even the smallest matters, such as gas or oil, or the wages of servants at a station. This parsimonious system will, however, if carried to an extreme, be found to operate prejudicially to the shareholders; for if an accident under such circumstances as we have above detailed should occur, it may well be that the jury will be fully justified in finding that it was by the negligence of the company, and may award in conjunction with such a finding, by way of compensation to the injured party, heavy and exemplary damages.

As already intimated, we shall resume these notes on Railway Liabilities in a future number.

ART. IX. — LUSH'S PRACTICE OF THE SUPERIOR COURTS OF COMMON LAW AT WESTMINSTER.

Second Edition. By James Stephen, of the Middle Temple, Barrister-at-Law, and Professor of English Law at King's College. London: Butterworths. 1856.

THE period for measuring and forming a correct opinion of any Act of the Legislature, so far at least as regards its practical operation, is not immediately after it has received the Royal Assent. The object and intention of a statute may or may not be apparent, but its full effect cannot be at once determined. It is like a machine just constructed for the performance of a mechanical operation. The design is known; the different parts appear, and may be in fact well adapted for the fulfilment of that design; but until it is actually set in motion, all is doubt and uncertainty, and the most skilled artizan will scarcely venture an opinion as to its failure or success. *He must first see how it works.* Nor is the result wholly contingent on the skill of the fabricator. If the contrivance be placed under the control of unwilling agents, who have no interest or sympathy in common with the inventor, his success may yet be marred by carelessness or indifference. So it is with the generality of the statutes, the creation of Parliament, placed in the hands of lawyers to deal with and determine their fate.

The case has been somewhat different, however, with respect to two recent statutes—the Common Law Procedure Acts of 1852 and 1854,—each founded on well-considered reports, the work of commissioners selected from the judicial bench, and from the foremost ranks of the Bar,—they came out of the hands of the Legislature without having been subjected to the ordinary amount of distortion and mutilation of committees, and with the striking advantage of having their provisions discussed and determined by their framers and originators.

But without dwelling on or attributing any weight to the fact, that there remained a majority of the Bench in each of the Common Law Courts who could not be assumed to have

any parental fondness for the revolutionary Acts, there were necessarily many questions of greater or less importance arising on them, which it was impossible to say would be determined in this or that particular way. Those who descant from day to day on the uncertainty of law, should bear in mind that on scarcely any subject in the various transactions of life do two persons take exactly the same view. Up to a given point there may be accord, but at some stage or another unanimity ceases. If all pull together with respect to the object to be attained, or the thing to be done, the *modus operandi* is the point of the road at which we are straining to pursue different courses. If this be so in the economy of a household, or the conduct of a campaign, shall it—can it be less exhibited in the construction of language, or in the answer to questions which are only presented for consideration, or are at least only recorded, because there is a reasonable doubt?

There is, moreover, this peculiarity in the duties of a judge, that while others, in the fulfilment of their duties as members of the commonwealth, find it repeatedly necessary to sacrifice their individual opinions, and to call on others to do the same, in order to attain one common object, it is the duty of the judge to resist those tendencies, and to form and express his opinion founded on his own individual convictions, and in cases of the 'first impression,' at least, he fails in his duty in proportion as he defers to the authority of his brethren, unless his mind follows the avowed assent.

It was impossible, therefore, that the Profession could have a satisfactory and accurate treatise on the new practice under the new Procedure Acts, ready cut and dried, immediately on their becoming the law of the land; but during the period of between three and four years which has elapsed since the first and principal of these statutes and the new Rules of Court came into operation, its chief provisions have been brought into full play and discussed in our Courts. The Profession, therefore, had a right to expect the assistance of a recognised work, presenting the practice in a complete form for their guidance, having for some years had to feel their way as best they could. It would be ungrateful and unfaithful, however, to say that they

were left merely with the bare sections of the Act. They have had the invaluable assistance of careful editions of and treatises upon the Acts by Francis, Philips, Holland, Wise, Pearson, and Finlason, with pleading and other forms by Chitty and Greening. These works, however, were never intended to, and could not possibly, supply the place of those complete guides to the practice which the Profession previously associated with the names of Tidd, Chitty, and Lush.

It is under these circumstances that a new edition of Mr. Lush's practice has appeared, under the editorship of Mr. James Stephen, a gentleman already known in the Profession, and we are rejoiced to say that an examination of the work enables us to pronounce a very favourable opinion on the manner in which Mr. Stephen has executed his laborious task. It is a matter in which our congratulations are not confined to the author and publishers; for the Profession at large, from the Bench to the Bar, from the masters and officers of the Courts to the attorneys, each and all are deeply interested in the character of the work. An ill-written book is as injurious to the Profession as it is to the author, for, while it does not answer its purpose, it often prevents the appearance of a more worthy substitute. Mr. Stephen's editorship has not been of the ordinary kind. It too often happens that the original author of a treatise having, either from extensive practice or other causes, no opportunity of personally preparing a second or subsequent edition, the task is assigned either openly or secretly to some one who is either unable or unwilling to use the pruning-knife firmly but discreetly, and thinks his duty is done by the addition of cases and statutes, under their proper heads, and so the work (if successful in a commercial sense) passes through successive editions, until it becomes a mass of crude, undigested, contradictory, and erroneous propositions and *dicta*. So often is this the case that we almost dread to take up a new edition of a work that has passed out of the original author's or editor's direct and immediate control. In the work before us, it was indeed impossible that the course we have condemned could be pursued; while Mr. Lush's well-deserved position in the Profession forbad his attempting the labour of editing the work

himself, it was evident that an editor could not possibly shelter himself from great individual responsibility.

Mr. Lush's name is properly retained on the title-page of the book before us. The arrangement, style, and the greater part of the introductory portion of the volume remain his own, but the body of the work has been, to a great extent, necessarily re-written; and it is only fair that Mr. Stephen, having incurred the labour and risk, should be entitled to that part of the reward of success which consists in the general knowledge of this fact. The introduction, comprising upwards of 240 pages, and commencing with the "Jurisdiction of the Courts," and including very valuable chapters on parties to actions, required careful editing, but not of any extraordinary kind, or calling for greater interference with the original text than a lapse of fifteen years (for the last edition was published in 1840) might be reasonably expected to demand. Still, evidence of Mr. Stephen's labours and accuracy occurs at every page, of which the notice of the recent statutes, affecting debtors and creditors, and the effect of the nonjoinder and misjoinder of plaintiffs and defendants in actions, may be referred to as instances.

But when once the body of the "Practice" is arrived at, commencing with the issuing of the writ, and terminating with a chapter on County Court appeals, we find ourselves, in fact, in possession of a new work—a structure following the design of the original, retaining much of its form, and using some of the old materials, but rebuilt from the foundations. The writ, its indorsements — general and special, renewed and concurrent writs, service abroad, and proof of service, are necessarily new. So also are, to a great extent, the whole proceedings, from appearance to trial and judgment, including the jury process—common and special,—amendments at the trial, the trial of issues by the Court or a judge, a great part of the subsequent proceedings as to execution, new trials, and the whole of the proceedings in error, special cases, &c.

As to ejectment, who can recognise it, bereft of its old associates, John Doe and Richard Roe? John Doe has gone without a tear, and deservedly so; for he who insensibly succeeded to a great part of the property of this country on the demise of his

lessors, could not at his own demise exact much of our sympathy; possessed of much *realty*, but with no *reality*, he and his persecuted letter-writing friend have disappeared.

In sober earnestness, however, in no part of the work does the contrast between the past and the present appear in a more striking light than in Mr. Stephen's chapter on the present action of ejectment, where all its stages are clearly and in an orderly manner set forth.

In the chapter on costs, a subject necessarily very much condensed, Mr. Stephen has fairly availed himself of Mr. Gray's recent work on that important subject. The chapter on the inspection and discovery of documents and interrogatories (as to which we shall have a word to say presently) is, of course, a new feature in the book,—and a very valuable addition it is, reflecting the greatest credit on Mr. Stephen. The chapter on arbitration is written apparently with equal care.

Having done Mr. Stephen the justice of expressing our opinion of his book, entitling it to the confidence and esteem of all branches of the Profession, we must add that his volume has received all the aid that type and the arrangement of type can give it. The marginal notes, valuable in all works, but especially in a book of reference, not to be read through, but to be consulted on a thousand points and on a thousand occasions, would alone favourably contrast this edition with its predecessor.

The appearance of this work gives us an opportunity for making a few observations on the treatment by the Courts of the two Procedure Acts, and the prospects of the Profession with respect to some of their provisions.

On the whole, our feeling is one of gratitude that the Acts have been met by the Courts in a fair and friendly spirit; the result, in part, of their own merits and impregnability, and in part, perhaps, of the character and position of their framers. They have, indeed, encountered occasional and invidious comparisons and reproaches in the Exchequer, been taunted and sneered at in the Common Pleas, and cautioned and admonished in the Queen's Bench. We can forgive all this, however, when we

think how fully the provision abolishing special demurrers has been carried out, albeit a very little exertion might probably have materially crippled this part of the Procedure Act of 1852. Of late years, almost all the demurrers were special; not because a special demurrer was necessary, but because it was just as easy to draw a special demurrer as to demur generally and specify the grounds, while it was safer, and did not disclose the point and manner of attack any more than a general demurrer. By degrees the distinction between the necessity for a special and the sufficiency of a general demurrer to enable an objection to be taken, became, as it seems to us, obscured; for a reference to the older cases certainly points out mere technical objections only as the subjects of special demurrer. Be this as it may, we rejoice in the liberal mode in which the recent provision is applied; we are the more thankful for it, because the Courts, in so doing, deprive themselves of many an intellectual struggle, calling forth very high mental qualifications. Whatever may be said to the contrary, the argument on a special demurrer was a feast of reason. It was a dry feast, however, and without the flow of soul to wash it down; and, worse than all, a feast with no practical result, beyond entailing vexation and heavy costs on the unwilling and grudging host at whose expense it was served up!

On the other hand, we cannot speak so favourably of the course taken by the judges with reference to those important provisions by which one party is empowered, not only to apply for the production of documents in the hands of his adversary, but to compel him to disclose the fact of the existence or otherwise of those documents. We are compelled to say that the difficulties thrown by the Court in the way of applicants under these powers have, in a great measure, nullified the intentions of the Legislature. The Courts seem to think that a wrong is done to a plaintiff if a defendant becomes aware of the mode in which the former intends to support his claim; and they have accordingly been very astute in drawing nice distinctions between the disclosure of facts required to establish the applicant's case, and facts essential to the success of his

adversary, and so encourage suitors to keep defendants in the dark, and surprise them at the trial.

There are other, although perhaps minor points, on which we are presumptuous enough to entertain a feeling of dissatisfaction at the conclusions at which the judges have arrived. We have already alluded to the action of ejectment, and rejoiced at the changes effected in the mode of procedure for the recovery of landed property. Under one state of circumstances, however, a plaintiff, by a decision of the Court of Exchequer, is placed in a worse position than formerly, which we will proceed to explain. Under the old action of ejectment, a landlord residing abroad and desirous to defend the action was liable to be called on to give security for costs. (See Doe *d.* Hudson *v.* Jameson, 4 Man. & Ry. 570.) The Common Law Procedure Act, 1852, allows the persons named in the writ to appear of course as unconditionally, they being the parties called upon to do so by the writ. The Act then goes on to provide (sec. 172), that "any other person not named in such writ shall, by leave of the Court or a judge, be allowed to appear and defend, on filing an affidavit showing that he is in possession of the land either by himself or his tenant." It seemed, however, only reasonable that a landlord, not being the party sued by the defendant, but himself seeking to be a litigant party, although having a right to defend, might be called on[1] to give security for costs as before; and we observe that this is the view taken of the new statute by Mr. Gray in his *Law of Costs* (pp. 206, 207). A majority of the judges in the Court of Exchequer have, however, ruled that the right of a landlord to defend is, under the Common Law Procedure Act, subject to no such condition. Lord Wensleydale, then Mr. Baron Parke, however, expressed himself of a different opinion, and took, as it seems to us, the common-sense and righteous view of the question. "If the plaintiff," says that learned judge, "sues the man who is in possession, that person is liable to him, unless he has somebody substituted in his place who is liable to costs; and if nobody comes in to defend, then he tries the question with the person in possession or who had possession of the

[1] *i. e.* When out of the immediate jurisdiction of the Court.

estate, or tries the title in question with the tenant, at the peril of the tenant paying the costs in case it turns out that the landlord is entitled. If, therefore, a person applied to the Court to be let in as sole defendant, instead of joining with the tenant (in which case the plaintiff would have had the security of the defendant for costs); that is, if the landlord puts himself in the place of the defendant, and puts a new person in to litigate the title, I certainly thought, and I am not at present convinced to the contrary, that it is a very reasonable qualification to insist that if you are a foreigner, and do not come within the limits of the Court, it is highly reasonable, in case you are beaten in the action, that you should pay the costs" (Butler *v.* Meredith, 24 Law J. Rep. (N. S.) Exch. 239, 242.) It is due to Mr. Stephen to add, that although this case was only very recently decided, and of course still more recently reported, it is to be found duly noticed in the proper part of his work; and this offers a fair instance of the care he has taken to watch the proceedings of the Courts, and incorporate their decisions in his book down to the latest possible moment.

There was another decision of the Court of Exchequer in Michaelmas Term last (of which no accurate report has, we believe, yet appeared), at which we must also be permitted to grumble. It is with reference to the right to issue a concurrent writ of summons for the purpose of serving a defendant abroad. The case was this. A plaintiff having issued his writ of summons, and continued it by *alias* and *pluries* writs under the 2 W. 4, c. 39, on the passing of the Common Law Procedure Act, 1852, renewed the original writ from time to time under sec. 12 of that act. Hearing at last that his debtor was abroad, he naturally sought to avail himself of the 9th section of the Procedure Act by issuing a concurrent writ within six months of the last renewal of the original writ, and the writ was accordingly issued and served abroad. The Court of Exchequer, however, set it aside on the ground that a concurrent writ must be issued within six months from the first commencement of the action, or, as in this particular instance of a writ issued under the old law, within six months of the first renewal.

(Cole *v.* Sherrard, Exch. Dec. 1, 1855.) The effect of this decision is that a plaintiff, who is desirous of keeping alive his right of action, must, in order to prevent his being defeated in his object, issue and renew a concurrent writ *pari passu* with the original writ and its renewals, although the plaintiff may not have the most remote idea at the time that the defendant is going abroad, and the defendant himself may have no intention of the kind. As the former remedy by outlawry is abolished, it behoves the Commissioners to look to this point in a future bill. It appears to us, however, that a reasonable construction of the word "original," as contrasted with "concurrent," would have obviated this apparent defect.

We have thus pointed out two instances in which a plaintiff is unfairly prejudiced by the construction put upon the Procedure Act of 1852. We shall now notice a looseness in the practical operation of the same statute, inflicting a hardship on defendants. It is under the 17th section, providing proceedings where personal service of a writ cannot be effected. It enables "the plaintiff to apply from time to time, on affidavit, to the Court out of which the writ of summons issued, or to a judge; and in case it shall appear to such Court or judge that reasonable efforts have been made to effect personal service, and either that the writ has come to the knowledge of the defendant, or that he wilfully evades service of the same, and has not appeared thereto, it shall be lawful for such Court or judge to order that the plaintiff be at liberty to proceed as if personal service had been effected," &c. Now what we complain of is, that actions have been allowed to be proceeded with where, in point of fact, a defendant is avoiding service of a writ at the suit of creditor A, and then a writ is issued at the suit of B, who may or may not have a legal claim against the defendant, and in the absence of the latter obtains judgment behind his back. It is clearly the meaning of the section just specified, that the defendant, to come within it, must be shown to be wilfully evading the service of the particular writ. We do not think it is a sufficient answer to say that the plaintiff may apply to set aside the service and judgment if it has been irregularly obtained. It is desirable that the attention of judges at cham-

bers should be called to this, or the service of the process of the Superior Courts will become far more loosely executed than the service of summonses in the County Courts.

There are wider and more important fields of inquiry and observation as to the operation of the last Procedure Act, on which we have not space now to enter, and in respect to which it is perhaps desirable that we should first have a greater experience. It may be questioned how far the arbitrary power of compelling references will answer. Will any satisfactory result attend the compelling an unwilling defendant to refer his cause to an equally-reluctant arbitrator? This is what is generally done when causes are referred to the masters, who receive no remuneration whatever for the additional labour thus imposed on them, inasmuch as although the client pays for the master's time, the amount is handed over to the Treasury.

The Rules of Court allowing a plaintiff to lay the venue where he pleases, invade, in our opinion, the wholesome restrictions of the Common Law, and tend to inflict ruinous costs on parties in payments to witnesses, attorneys, and others, often repeated and doubled by remanets. A more equal distribution of the two circuits, or the introduction of a third, would avoid the weight which now certainly attaches to the argument, that unless suitors are permitted to bring their actions before London or Middlesex juries, they are delayed, and sometimes altogether defeated, in obtaining their rights.

The above and other matters, we hope, will receive the attention of the commissioners who have, on the whole, so well executed their task hitherto; and, in conclusion, we can only express our satisfaction at the recent elevation of two of those commissioners to the judicial bench, which may be deemed a favourable augury for law reformers.

Art. X.—ON UNSOUNDNESS OF MIND, IN ITS MEDICAL AND LEGAL CONSIDERATIONS.

By J. W. Hume Williams, M.D. London: John Churchill. 1856.

LUNACY, in relation to crime, has become of late years a subject much discussed, both in England and on the Continent, and we perceive no indications of the many important questions connected with this branch of medical jurisprudence being as yet considered exhausted—at least by the professors of physic in England. Nor, indeed, if one holds that the conclusive determination of a question is the *only* proper signal that its further debate may be excused, can we affirm that the time has come for learned authors to cease from disputing as to lunacy in its various legal aspects. We may, perhaps, be further advanced than we were in earlier times towards a perfect comprehension of the principles which ought to govern Courts of Law, and guide scientific witnesses, in the performance of their respective functions when a plea of lunacy is set up by a prisoner at the bar; but whether this is so or not, it is pretty clear (and the volume before us affords a confirmation thereof) that there are many medical men who are not satisfied either with the law as it is, or with the lawyers, as they find them in the Criminal Courts. Neither the Bench nor the Bar, it appears, is deemed competent to the consideration of certain difficult matters, which at any time are liable to be raised on an indictment where a plea of lunacy is set up; and, to do the medical experts justice, they do not for the most part hesitate to say so.

In civil suits, too, the lawyers, whether as advocates or judges, are not unfrequently condemned to no little obloquy, if they do not adopt either implicitly the dogmata of medical witnesses, or do not accept as all-sufficient the theories propounded by them. This is all the harder upon the jurisconsults, for in the greater number of actions, suits, and trials, medical witnesses are called to support both sides of the case, and establish diametrically

opposite views of the same question. An additional difficulty is thus imposed upon those whose province it is to determine on the facts, by their having to decide, as well on the balance of the learned authorities produced, as on the facts and arguments brought forward.

It is no part of our duty at present to affirm that all the magistrates of the land, past or present, Chancellors and Vice-Chancellors, the chief and puisne judges, have been and are adepts in "psychological" science, or that the Bar engaged in active practice affects much metaphysical or "psycho-ethical" study; still less do we propose to raise any antagonism between the two learned professions of law and medicine. Further, we will assume that the law of evidence on criminal matters in relation to unsoundness of mind is, as it is alleged to be, imperfect, and may sometimes produce miscarriage of justice; but all this by no means demonstrates that certain remedies, which we find somewhat loosely broached or vaguely discussed in the volume before us, in regard to the testimony of medical men, would be beneficial or even feasible.

No one, we presume, would more readily admit than Dr. Hume Williams that all human tribunals are fallible; that witnesses, professional or general, are liable to err in their judgment and mislead by their testimony; and that all that society can hope for is an approximation to justice and entire immunity from gross blunders in our Courts. It is obvious, therefore, that a case is by no means made out against the existing rules of law and system of procedure, by showing that there are occasional deviations made from the pathways laid down for law to travel in, or by establishing the fact that a general rule will sometimes fail in its application in particular cases. Let us by all means limit, enlarge, or correct our rules and our practice, whenever such a course is proved proper; but for so doing we must first see good grounds—which we think Dr. Williams has not adduced—and a safe substitute for what we are called on to abandon, which we have sought for in vain in the volume before us.

We may dismiss at once the consideration of improving the administration of our criminal law by empannelling medical juries to try certain difficult questions of lunacy. On this proposition

we may quote Dr. Williams's own words:—"If," says he, "it be contended that medical men are so pre-eminently adapted for such intricate investigations, and it be conceded that cases may arise in which the psychical estimate of crime involves many abstruse and difficult considerations, it may be asked, 'Why are other than medical juries empannelled to adjudicate on such matters?' To this we reply:—There are many grave and fitting reasons that the existing state of the law should be maintained. Were medical men required to primarily decide on the soundness or unsoundness of mind of an individual accused of crime, unless their opinions embraced the act originating the accusation, their adjudication would be altogether unjust; for that act might be the hinge on which their estimate of his sanity should turn. If, on the other hand, they include this act, the onus of proof respecting the guilt or innocence of the party accused is thereby placed in their hands, and we have no grounds for inferring that, under such circumstances, greater unanimity would prevail than is seen in ordinary tribunals. Were they to assume the act as committed, they should thereby identify the question of the accused's sanity with that of his criminality. These, and many other reasons we might adduce, have fully satisfied us *that determining guilt or innocence by the voice of the jury, the soundness or unsoundness of mind by the judgment, according to the evidence, of the physician,* is the course best calculated to maintain public confidence and insure public safety" (pp. 36, 37.)

Whether, indeed, twelve medical men should be empannelled as jurors to entertain the whole subject-matter in the court of justice, or summoned as witnesses to affirm peremptorily sanity or insanity, under certain circumstances of difficulty, would be to our mind, and so far as our experience extends, equally unlikely to produce unanimity or satisfaction. In fact the medical profession is not agreed upon general principles, and the widest difference of judgment on individual cases, as we see in the volume before us, constantly occurs. In the case of Buranelli, for instance, the somewhat important difference of opinion seems to exist as to whether he was a murderer *in* law or murdered *by* the law. Some learned authorities, including perhaps

Dr. Williams, have no doubt but that the unfortunate man was lunatic, and therefore murdered; while medical witnesses of great eminence, on the other hand, gave on the trial clear and unhesitating testimony, and the jury found, that for all purposes of being considered responsible for maliciously and revengefully taking the life of another, and for suffering in consequence the penalties of the law, he was sane. We have alluded now, it must be observed, to Buranelli's case (not to discuss the propriety of the verdict, in which, however, we concur, but) because Dr. Williams has himself referred to it, and it is one of the latest illustrations of our present position; viz., that if medical, and not legal authorities, had the sole determination of or greater influence over such verdicts, which always have been and will be canvassed and questioned, the same doubts and difficulties would occur as now.

Such conflict of opinion, so pregnant with important consequences as this is, does not then depend upon the prejudices of the judges, the ignorance of the Bar, or the incapacity of jurymen—but upon the obscurity of the subject itself, and upon the diversity of views which, belonging to different schools of medical men and to individual minds, is necessarily presented in discordant evidence, and which we believe to be, under any circumstances, inevitable on these occasions.

Dr. Williams candidly admits the fact that *medical* testimony is not invariably a safe guide. "We may observe," he says, "that "it is a fact, no less humiliating than true, that it will not unfrequently occur, when the most important cases come to be decided, there is a direct antagonism in the views of 'the highest authorities' on legal as on medical points; unhappily proving that the soundness of an individual's opinion is not always proportionate to the greatness of his genius" (p. 18). The author, however, thinks that this "antagonism" arises partly from the imperfect means of elucidation applied, partly from a "partial and one-sided view of nature which some have advanced." Alas! this may be so, but it affords us no guarantee that, at least for the present, by committing to the hands of medical experts the whole field claimed for them exclusively, there will not be, from the very same causes, a perpetual clashing

of opinions, and an inevitable, "humiliating," and even more disastrous war of authorities.

Can we then, with advantage, call into requisition, otherwise than now is done, the skill of scientific medical witnesses in criminal cases where lunacy is pleaded; and if so, how? Let us see what Dr. Williams says as to the proper province of medical witnesses on this subject:—

"Society is fully warranted in being jealous of her rights, and equally justified in seeking to prevent any body of professional men from assuming an authority in reference to matters affecting her interests, those matters being within her own control. Both the Bar and the public are, however, deceived, when they presume the general, not the particular application of medical opinions. The question to be determined in psychological investigations is not whether certain phenomena indicate the soundness of the mind or morals of all men, but how far they may enable us to estimate their relative condition in a particular individual. Were it otherwise, we should presuppose a uniformity in the mental constitution, which ordinary observation negatives. A physician is called on to declare his diagnosis; the value or nature of a certain indication is to be decided; does not his experience dictate a scrutiny—*first*, of the special symptoms which may be identified with this indication; *second*, of the general condition associated with these symptoms? Were he guided by the first alone, it is quite possible that in a single instance he might be right, but more than probable he would be usually wrong; did he depend wholly on the latter, the presumption is, he should be rarely, if ever, correct.

"Where, then, does the value of special or general symptoms rest? *In their order of progression and combination, their association with each other, and their relation to the particular indication.* Now, in mental disease the special symptoms are the manifestations associated with the act indicated, the general symptoms finding their analogues in the ordinary mental operations. The *previous history* becomes, therefore, as essential for the appreciation of the psychical as of the physical condition. But it may be said, those mental operations, constituting the history of the case, are open to the consideration of all, and if

this be the basis of your professional opinion, we deny your right to claim any advantage! The history of the case is one thing, the capability of medically reasoning on it another; and though we do not question the logical acumen of many wholly ignorant of medical matters, yet we assert that, in consequence of this ignorance, their capability of reasoning is open to the objection that they must presume variable data as confirmed, whereas it is the establishment of the nature of those data which constitutes the essence of the inquiry.

"Medicine is admitted to be a science of observation and analogy, in which experience declares that certain inferences may be drawn from the operation of different agents on organisms which nature has happily ordained should have a close similarity in each. Psychology, while being equally a science of observation, is even more so one of analogy; since the mental organism, being dependent almost wholly on external circumstances for its development, is as a consequence infinite in its variety. The standard of physical health of one is generally but a type of the same condition in many. The criteria of mental health may, it is possible, be peculiar to the individual. Our physical constitution we admit to be influenced by a variety of circumstances over which we have no control, but whose power we can fully appreciate as more or less tending to modify the action of disease. Our mental constitution, it will be seen, while being identified with our physical, and as a consequence under the same influences, having, moreover, an independent organism, is alike capable of being acted on by circumstances altogether different in their nature. In our analysis of vital actions, as physically manifest, we recognise but the one undivided vital principle. In our analysis of mental vitality, as evidenced through psychical actions, we are presented with a duplicate operation of an integral power, evidenced in the intellectual as contradistinguished from the moral faculties; while, to increase the difficulty, those faculties, in many instances, seem to acquire an independent existence, since there are abundant proofs that not only may one be exercised irrespective of the other, or harmonize with the other, but it is even quite

possible that in their separate operations they may, to all appearance, seem directly antagonistic.

"If, then, in the diagnosis of physical disease the history of the case is regarded as essential for showing the order of development, combination, and progression of indications whose aggregation we are required to determine; how much more important is it, that in mental disorders all previous circumstances be not only fully investigated, but fairly estimated, for determining the influence they may have exercised on the several faculties!

"We know that in the physical organization, unless certain functions be duly performed, deviations from the admitted standard of health become sufficiently manifest to constitute disease. Mental operations present, however, innumerable deviations from the approved standard of sanity, and they cannot be received *per se* as evidence of disease, for this reason, that the mental constitution having no fixed standard, the operations of two minds admittedly healthy may be diametrically opposed, and owing to the capability of independent action which *appears* to be exercised by the moral and intellectual faculties, the operations of a sane and insane mind may be perfectly identical, contradistinguishing moral crime from disease. Unless then, in such investigations, the mind be habituated to question with accuracy and to reason with caution, it is open on all sides to an infinity of sources from which error may arise.

"In physical diseases we have generally visible or tangible evidences by which to recognize the peculiarity of the organism. In psychical affections we can have no means of estimating the character of any mind except through its operations. It is, therefore, essential, for all undertaking such investigations, that they be possessed not only of distinct criteria by which to define mental health, but that they be also fully competent to estimate those various agencies which, apart from physical influences, act or re-act on the mental constitution. We have said 'apart from physical influences,' for we wish it not to be forgotten, that the physician is alone competent to speak authoritatively

in cases where the immediate instrument of thought is involved."

Now we can understand how a commission of scientific men might be appointed to investigate and estimate the previous history, and all the surrounding circumstances connected with the conduct, constitution, and such other topics as are usually brought forward on behalf of prisoners who seek impunity for their acts on the score of unsound mind. The reader of Feuerbach's *Annals of Remarkable Crimes in Germany*[1] will comprehend how it would be possible to adopt such a system of investigation as is there exhibited, by which inquisition is made as to the whole life, nature, and attributes of an accused person; and he will see how, with Teutonic laboriousness, every point, physical and psychical, might be laid before a judicial body, and the case be by them disposed of. Months and years might be dedicated to such an investigation (which includes, of course, personal examination of the accused), and it *might* result either in a verdict being pronounced absolving a prisoner from the consequences of his conduct, when a jury would see no circumstances warranting them in so determining, *or* possibly it might end in the righteous conviction of an artful criminal who would have escaped at their hands in an ordinary trial, by a well-feigned insanity and strong dogmatic medical evidence; *or* upon the ground of "difficulty," and through contemplating repugnant theories skilfully propounded,—such as we find stated with great learning in the volume before us, without, however, much aid being therein afforded to solve the one or reconcile the other,—such a learned commission might come to the conclusion that they could not make up their minds upon the point at all, and that the matter was too deep for any one to fathom. A machinery like this must, we think, be invented if we determine that responsibility is to attach only upon the considerations and principles which we find echoed in the book before us.

If, however, we are not prepared to abandon the usual crimi-

[1] Aktenmässige Darstellung merkwürdiger Verbrechen von Anselm Ritter von Feuerbach. Giessen, 1828. A selection from these *causes célèbres* was translated by Lady Duff Gordon a few years since.

nal procedure in cases of alleged lunacy in favour of such a commission, can we, instead, modify the rules of law now in force, especially those regarding medical evidence? Now our present rules of law, with respect to evidence of insanity, are at least positive, and present clear distinctions to the ordinary mind —merits, we regret to say, which we do not perceive in Dr. Williams' suggestions. And although we fear it is true that a man may be so insane as not to be properly a subject of punishment, and yet not being able to prove it, he may be condemned; still we must remember that if in such a case the prisoner were acquitted upon the *ipse dixit* of a doctor who, with peculiar means of discrimination, perceived the fact— hidden from the common eye, and imperceptible to the common sense and belief of the world,—the result would be most mischievous. It would present to the public the demoralizing spectacle of a guilty man escaping upon a favourite plea, and the consequence of this impression upon the minds of the viciously disposed is too well known.

We do not say that the rules on M'Naughten's case might not be amended in some respects; but, be this as it may, we had better keep them intact, with the occasional inconvenience which may arise in their application, than by abolishing them be driven to float solely at the mercy of the uncertain impressions of learned men, however eminent they may be.

In a very recent work[1] we find the principles in M'Naughten's case accurately stated, and although our readers doubtless have them in their recollection, it is well perhaps briefly to advert to them, as they are frequently made the object of so much censure. In M'Naughten's case (10 Cl. & F. 210), then, it was laid down that when a person alleged to be afflicted with insane delusions respecting one or more particular subjects or persons, is charged with the commission of a crime, and insanity is set up as a defence, the jury should be instructed, that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the

[1] Commentaries on the Common Law, by Herbert Broom, Esq., M.A., &c. &c., p. 882.

ground of insanity, it must be clearly shown that, at the time of the committing the act charged in the indictment, the party accused was "labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong." If the accused was conscious that the act in question was one which he ought not to do, and if that act was at the time contrary to the law of the land, he is punishable. The usual course, accordingly, is to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act which was wrong; the question thus submitted being accompanied with such observations and explanations as the circumstances of each particular case may require.

The law as above stated does not appear to us to have been —nor likely to be—a fertile source of cruelty to the insane, while it certainly is valuable, from its positive character, as a protection to society.

If we were to relinquish our present principles of law in cases of alleged lunacy, in order to balance nicely, and with all the aid which metaphysics and psychology can afford, the amount of a man's responsibility, according to the state of his faculties, opportunities, history, and condition, why not follow the same method in many other cases? There is a passage in one of Dr. Mayo's works,[1] published some time since, which, bearing upon this subject, and expressed in the vigorous language (which, by the way, is not the least excellent characteristic of this author's writings), is worth quoting here:—

"A child is born in the garrets of St. Giles's, the offspring of a prostitute and a thief. He receives a suitable education, and he adopts the father's profession. After following it with assiduity and success, he is arrested in the course of it, and tried for his life. His early habits are ascertained on unquestionable evidence; but do these considerations soften the rigour of the law by placing him before the public as an irre-

[1] Clinical Facts and Reflections; also Remarks on the Impunity of Murder in some cases of presumed Insanity. By Thomas Mayo, M.D., F.R.S., &c. &c. Longman & Co., 1847.

sponsible being, the creature of circumstances over which he has had no control? By no means. In one respect they tend to insure his condemnation; namely, in making his deliberate performance of the criminal act more probable. Finally, this person is hanged or transported, according to the nature of his offence; and it is, probably, very fit that he should be so treated. I do not object to the decision of the law, in the case which I am supposing, provided a consistent view is taken of certain other cases in their relation to the plea of irresponsibility.

"It is clear we do not test the liability to punishment of the above offender by his presumed moral responsibleness, but by some other criterion; and this criterion, I will at once assume, is furnished by the question, whether punishment in the case supposed will or will not prevent the repetition of the offence.

"Now the above remarks have an important bearing on the subject of the unsound in mind, viewed in its relation to delinquency. Their exculpation (when allowed) at present rests on the plea that they are irresponsible; but this plea is not permitted to operate in favour of the case first supposed, to which it is applicable in as high a degree. Yet right reason, and the sympathies of our nature, appear to dictate a common criterion in common cases."—(Chap. xxiii. "Remarks on impunity of murder in certain cases of presumed insanity.")

We think that Dr. Mayo has here put his case very forcibly, and if we were to try criminals merely with regard to the degree of probable moral responsibility incurred, the present system of criminal law must of course be surrendered. To this no one can object, when a better shall have been planned, and such shall at least have our zealous support, in spite of our professional prejudices. But, for the present, we believe that the criminal law, even as now administered, is by far more satisfactory and effective for its purpose, than it would be with such alterations as would be necessary to meet the views of some medical authors.

No practical scheme, then, can be successfully laid down, as we think, with respect to adjudicating on criminal charges, which is based upon administering justice according to the

nature and amount of responsibility of the criminal. We may make two classes, the responsible and irresponsible; but as soon as a man is placed on the first division, we know of no system which appears feasible, though some have been suggested, by which a prisoner can be tried, or punishment can be measured, merely according to the amount of moral guilt incurred. How could a Criminal Court (even if assisted in medical and moral points by assessors selected respectively from the College of Physicians and the Bench of Bishops[1]) enter, with any chance of success, upon determining the extent of the responsibility of a prisoner? Can we take into account his education, the character of his parents and relatives, the examples set before him in his early life, his original constitution, the extent and nature of his temptation, his original moral sense, intellectual vigour, and the other ingredients which it would be essential accurately to estimate?

We are aware that it may be said that the division into responsible and irresponsible agents, is equally accepted by all parties,[2] and that the only existing difference is, that one of them insists that it should be left to the physician alone to distribute the accused between the two classes—that it is his province to say, "I think disease will excuse or explain such acts, though to the understanding of non-medicals there is no connection between the state of mind and the act in question." Now, it may be very frightful to execute or punish in any way one who ought to be held excused; but it is more frightful, to our mind, to give over to the hands of a professional witness—and one perhaps of a somewhat speculative turn of mind—the safety of society, by entrusting him with the power of awarding

[1] Not long since we saw one of the most exemplary members of the present episcopal body electrify a solemn dinner party by gravely explaining that he was *by nature* intended for a detective officer, and that some of his finest faculties were thrown away in his diocese. He would probably have been eminent in any capacity; but pre-eminent as a criminal judge-bishop, as above suggested, if his self-estimate was a true one.

[2] See Dr. Williams's vol. pp. 204, 205.

It will be seen that we do not here enter into the subject of visiting some offences of the insane, or partially insane, with some form of secondary punishment. This has been discussed by Dr. Mayo in a little work, entitled "Medical Testimony in cases of Lunacy," lately published, and in some recent numbers of the Journal of Psychological Medicine.

upon an act—which on ordinary principles and experience would seem to be a crime, the natural result of revenge or avarice—that it was really the consequence of some disease, which *he* has recognised as exhibiting itself in a different fashion at a former period.

It is perhaps fair to Dr. Williams now to let him have the opportunity of comparing certain instances of the wisdom of doctors of medicine, as exhibited in Courts of Justice with the wrong-headed judges who affect to decide on matters beyond their skill. Thus in the case of John Ovenston, indicted at the Criminal Court (Oct. 27th, 1847) for feloniously shooting George Crawley, Dr. Williams says:—

"In this case it appeared that Mr. George Crawley, who survived the wound, had been instrumental in having the prisoner's goods sold under a judge's order, and that the prisoner in the afternoon of the same day attempted his assassination. On the evidence of Dr. Conolly it was proved that the mind of the prisoner had been gradually losing its power from the difficulties by which he felt himself surrounded, and that the crisis had arrived when he committed the act; and he (Dr. Conolly) 'did not consider that his being at the time of trial, or soon after the the transaction, in a state of perfect sanity, in any way affected the opinion he had formed, or was at all inconsistent with that view of the question.' Here we have the predisposing cause of the insane state—pecuniary difficulties—identified with the person of an individual (Crawley), and this individual becoming the proximate cause of the crime. This is as highly-instructive a case as is on record, for there was no prominent delusion, Crawley being the true occasion of the immediate distress. There was the existence of explicable motives on the part of the accused,—revenge on the admitted cause of his distress. There was proof of premeditation in going armed to the office where the occurrence took place. There was the evidence of self-control and discrimination which enabled the prisoner to withhold his violence until a fitting opportunity offered to effect it. There was the testimony of the medical attendant of the gaol, Mr. M'Murdo, who 'never observed anything to lead him to believe that he was of unsound mind;' while, added

to this, the statements of other intelligent witnesses were adduced, who affirmed that on those matters respecting which they were competent to form a judgment the prisoner seemed equally sane as themselves. Yet, with this accordance of facts, and such corroborative testimony, one of the most experienced as well as distinguished psychological physicians of any age, Dr. Conolly, declared, 'that he did not go the length of saying that the prisoner was unconscious of what he did, but he believed that he was acting under such an impulse as he could not control, and that he could not distinguish the wickedness of the act, although he was conscious that he was committing it.' This impulse must have been the result of a monomaniacal conception identified with the person of Crawley, for otherwise, to use the words of Mr. Baron Rolfe in the case of Charles Burton, indicted for the wilful murder of his wife and child, 'the excuse of an irresistible impulse, coexisting with the full possession of reason would justify any crime whatever."[1] To this latter case, tried at Norfolk circuit before Mr. Baron Parke, July 20, 1848, that of Ovenston was closely analogous, for in both the attempt at crime and its commission were suggested by a fact, not a delusion; both in their previous symptoms showed equal grounds for presuming the presence of disease; both after the commission of the crime attempted suicide; while, as regards the crime itself, there was this important difference, that on Ovenston's trial it was shown there were reasonable grounds for attributing the act to rational though vicious motives, while in Burton's case there was a perfect want of evidence to prove that any motives could have existed, since there was no known cause of disagreement between the man and his wife. The medical evidence in both was in favour of insanity; yet one was acquitted, and the other found guilty and sentenced to death, though subsequently admitted to be insane.

"Mr. Baron Alderson's opinion, when addressing the jury on the trial of Robert Pate, may be here quoted:—'In the first place they must clearly understand, that it was not because a man was insane that he was unpunishable; and he must say

[1] London Medical Gazette, 1848, vol. vii. p. 255.

that upon this point there was generally a very grievous delusion in the minds of medical men. The only insanity which excused a man for his acts was that species of delusion which conduced to, and drove him to commit, the act alleged against him. They ought to have proof of a formed disease of the mind—a disease existing before the act was committed, and which made the accused incapable of knowing at the time he did the act that it was a wrong act for him to do.' O upright judge, but most ignorant physician! Define how far insane men are responsible; associate in all cases delusion with insane criminal acts; diagnose in each instance the mind disordered previous to the consummation of the disease; identify the knowledge of right and wrong with the capability of voluntary action; or, in other words, attempt to lay down a rule which may fix to a standard the variable nature of man, and reduce to a special scale the mysterious working of Providence" (pp. 72-75).

The error of the judges, then, in criminal cases is, as we here see, in offering any opinion to the jury, and the mistake of the jury consists in exercising any judgment, in cases of alleged lunacy. It would be needless, also, it would seem, for the medical witnesses to assign any *reasons* in their evidence,—their arbitrary judgment must be accepted in each case upon its own individual merits, and independently of all rules. "When insanity is advanced as a plea in its extenuation, it must be by justification of the act through reason of the motives, and the exculpation of the motives on the grounds of the delusive conceptions. Accordingly, we find that many very eminent authorities have argued the necessity of establishing the relation between the delusion and the act. We admit that, in many cases, a capability of doing so exists, and that if such were possible in all, much anxiety would be spared those involved in their adjudication. The instances, however, we have detailed, and others we shall enumerate, prove *that it is not in the nature of insanity, as a disease, that such uniformity should exist*" (p. 65). If this be so, a medical witness need only say, for example,—"I am of opinion that, from the fact that the prisoner had in 1830 an uncontrollable passion for theft, he in 1856 must be held excused for shooting one whom he fancied

had injured him; he must be held irresponsible, *sic volo, sic jubeo.*" And the judge will only have to say,—"Gentlemen of the jury, you hear what the doctor says, and you will acquit the prisoner." Such an arrangement would, by force of authority, produce "harmony" in criminal procedure wherever the testimony of medical witnesses (or rather one medical witness) should be invoked, as very frequently would be the case; for most prisoners who were to be tried for serious offences would be advised to have their doctor to certify, as well as their counsel to defend. As to the conflict between law and medicine, Dr. Williams remarks,—"We firmly believe that a want of harmony must ever exist between the legal and medical doctrines of insanity in its connection with responsibility. The two cannot be identical; and for this reason—law demands a general rule, medicine admits but a general principle. What would be thought of the physician who undertook, in the definition of any, even the simplest disease, to say certain symptoms must be present? His theory would lead to a series of disappointments, his practice be a continuation of blunders! Yet law steps forward with her definition of unsoundness of mind; and according to this definition, on which both the life and reputation of society may depend, one-half mankind are mad, and half the mad are wise. Divest the mind of the body, establish a common standard of mind for man, and then propound a legal definition; make every question of right or wrong a simple proposition in metaphysical science; with Locke investigate the principles of our knowledge, or with Reid scrutinize the principles of our minds, and, irrespective of all other considerations, let every departure from the acknowledged standard be a crime, and every crime bring its responsibility; then, and not until then, can law assume the province of the physician. But while we acknowledge the humanity of man, and admit that his physical organization influences not only the development but also the healthy exercise of his mind; while we recognise the capability of experience to establish certain relations which every power of conception founded on that experience approves; without much violence to language or reason we may regard

those relations as necessary, and find in their study just grounds for inductions" (pp. 2 and 3).

If this want of "harmony" must thus exist between law and medicine, their co-operation should cease forthwith, and, to insure peace, one of the faculties must succumb; which may be either by the doctors assuming the sole administration over pleas of lunacy, or by submitting to give their evidence according to the established Rules of Law.

We must confess that in perusing Dr. Williams' volume we have failed to find much which we had expected. That he is dissatisfied with almost all the lawyers, and with some medical authorities, is pretty clear to us; that he desires an alteration in respect of medical evidence is obvious; but for practical purposes we have found, at least in its *legal* aspect, that the work is barren. This, at first, we attributed to the fact that it was brought out at intervals in the *Dublin Quarterly Journal of Medical Science;* and it is obvious that what might be profitably "ventilated" in a periodical, might not, perhaps, be of much value when reprinted in the form of a substantive treatise. However, when we came to the last page but one of the volume, we found another explanation of the defects we have noticed. The author there says:—"In concluding our inquiries on the important subject of 'unsoundness of mind in relation to responsibility for crime,' we may observe, that in its investigation our great object has been *to point out difficulties rather than to offer rules.*" This, indeed, was our estimate of the work. The subject is beset with "difficulties;" but most lawyers, and many physicians too, are pretty well aware of them, and their reiteration is really of small advantage to any one: Dr. Williams, indeed, has apparently a great dislike to rules, or any positive form of statement, notwithstanding his italicized passages and numbered paragraphs; and in our opinion the value of his observations is by no means enhanced thereby. We can appreciate very well the reason why *he* holds it more convenient to leave the decision in each individual case of unsoundness of mind alleged in exculpation of a criminal exclusively to the arbitrary judgment of a physician; but to others than himself the grounds

of his opinion on this point may contain equally cogent reasons for withholding from professional witnesses such absolute power.

There is one consideration, however, superior to all the conflict of authorities and the recapitulation of doubts and questions as to possible failure of justice in individual cases, and that is the protection due to society from alleged lunatics. It is through no lack of sympathy for the unfortunate that we say, however meritorious it may be to save the insane from unnecessary and unjust punishment, it is far more essential that the large number of people in various stages and forms of lunacy should not, under the plea of "unsound mind," shelter themselves from the consequences of their acts. There is abundant evidence that many members of the class we are speaking of can and do calculate on their position;[1] and that if impunity were proclaimed for all crimes committed by them, these would frightfully increase, and the plea of insanity would be the common resort of those who, resolving to be extremely vicious, hope to find witnesses who will depose that they are sufficiently mad to be acquitted.

In our remarks on the desultory disquisitions of Dr. Williams, we have avoided any discussion as to the different classes of the insane, whether monomaniacs or lunatics of other descriptions; nor have we entered upon any other topics connected with the subject, except as to the plea, in criminal cases, founded on non-responsibility arising from disease. A time may come when society shall be able to look upon all crime as disease, and on all felons as patients; but we must become more advanced both in the treatment of crime and lunacy before we can do this—if we ever can. We cannot now afford, any more than we have been able heretofore, to forget that one great object of punishment is to deter from crime. It is a most wholesome principle, which must be recognised and enforced, that he who commits a crime shall suffer for it. The term justice implies the compensatory principle. And our asylums afford ample evidence that the large body of lunatics are alive to the idea of rewards and punishments. If the belief once got abroad that

[1] See Dr. Mayo's work already referred to—Clinical Facts, &c., chap. 22, p. 197, *et seq.*

any kind of lunatic might commit with impunity any kind of crime (which is pretty nearly the effect of doctrines not unfrequently proclaimed), the consequences would be, we are convinced, most disastrous.

We must be on our guard against mingling in confusion the different objects of various classes of men whose respective functions should be for many purposes held entirely distinct. The compassionate physician has the treatment in his asylum of his patients in their manifold forms of insanity. The philanthropic governor or chaplain of the gaol or reformatory applies his zeal to the moral care of the wretched victims of educational neglect and evil passions; and he who presides in a Court of justice, though his sympathies, peradventure, are not less alive to the struggles of mental weakness than the practitioner in medicine, nor less anxiously enlisted in the cause of restoring to society its criminal outcasts, has, nevertheless, his special duty to perform, independent of his feelings. He will see that the law, when violated, shall by the law be vindicated. Unless it be shown, not on hypothesis founded on speculative and exclusively-professional views, but by clear evidence, and on established principles, that one accused of crime, and proved to have committed the act imputed to him, is not accountable to society any more than if he had involuntarily and unavoidably contributed to an accident by which injury to it had arisen,—the judge has the plain duty to perform of applying the law equally strictly whether the mind of the prisoner is shown to have been weak or strong, his temptations great or few, his repentance sincere or hypocritical, or his ultimate reform likely or improbable. There may be occasions when it is right in policy to mitigate a penalty; never can circumstances arise which will justify straining the law to procure an acquittal.

There are no rules in any system of jurisprudence under which the innocent have not been sometimes condemned, and the guilty acquitted,—none where difficulties in administering equal justice in all cases are not constantly experienced; but we may be assured that the doubtful cases will not be diminished in number, nor the confusion of crime with misfortune

be decreased in extent, if we repudiate sound legal rules and principles, by which we may determine who is and who is not responsible for acts committed against the law of the land and the well-being of society.

Art. XI.—REPORT BY THE STATUTE LAW COMMITTEE OF THE LAW AMENDMENT SOCIETY AS TO THE BEST MEANS OF CONSOLIDATING THE STATUTES.[1]

YOUR committee have considered with anxious attention the important subject submitted to them, and are now prepared to recommend such measures as, in their judgment, would most effectually insure the consolidation of the Statute Law. At the outset of their inquiry, their attention was naturally directed to the proceedings of the late Statute Law Board, and to the more recent proceedings of the present Statute Law Commission. Had the steps taken by both or either of these learned bodies been steps in the right direction, the task imposed on your committee would have been comparatively light; but unfortunately, with every wish to place reliance on the gentlemen who have hitherto been officially employed in this great work, your committee feel constrained—though with real diffidence—to question the soundness of the views entertained, and to dispute the propriety of the acts done, first by the Board, and next by the Commission. To justify this sweeping condemnation, a retrospective view of events will be necessary. Just three years ago, viz., on the 14th of February, 1853, the Lord Chancellor announced in the House of Lords his intention to attempt a consolidation of the Statute Law. On the 17th of March following, he again adverted to the subject from the Woolsack, and explained with precision both what his object was and how it was to be carried into effect. His scheme was fourfold. He

[1] This Report was read by Mr. Pitt Taylor to a special general meeting of the society, on the 28th ult., and was ordered to be printed and circulated.

proposed—first, to expunge from the Statute Book every enactment which had either expired, or become obsolete, or been repealed, so that it might be known with certainty what portion of the written law was still in force; secondly, to classify the existing enactments according to the particular subjects to which they related; thirdly, to consolidate into single Acts the *disjecta membra* thus classified, and, in so doing, to simplify their language, to strike out superfluities, to remove inconsistencies, and to introduce, as far as possible, a systematic arrangement; and, fourthly, to devise some machinery for correcting the errors of future legislation. To carry out this magnificent plan, a temporary Board was established on the 24th of March, 1853, consisting of a chief commissioner, Mr. Bellenden Ker, and four sub-commissioners, Messrs. Anstey, Rogers, Coode, and Brickdale. The members of the Board were appointed for one year. The chief commissioner was to receive 1,000*l.*, and was to exercise a general superintendence over the proceedings, but he was not expected to relinquish his private business as a conveyancer. The salaries of the sub-commissioners were fixed at 600*l.* each, and these gentlemen were required "to devote their whole time to the work." The Board met for the first time on the 2nd of April, 1853, and in a few days afterwards the *modus operandi* was thus arranged:—Messrs. Anstey and Rogers were "to proceed with a careful examination of the statutes, commencing with the earliest, and were to make a list of such as were obsolete, or expired, or directly or virtually repealed, * * * enumerating those which it might appear desirable at once to repeal or declare repealed, in order to remove so much useless matter from the Statute Book."

Mr. Coode was to be "employed in a critical examination of the statutes on a different system, beginning with the latest statute, for the purpose of ascertaining, exhaustively, what is the law now in force."

Mr. Brickdale was to employ "a portion of his time in revising the list prepared by Mr. Rogers."

In addition to these tasks the sub-commissioners were directed to prepare separate specimens of digests of particular branches of the law. Mr. Anstey was to digest "the law

relating to insurance;" Mr. Rogers, "the law relating to masters and servants;" Mr. Coode, "the statutes relating to the poor." The subject of distress for rent was intrusted to Mr. Brickdale, who was to prepare specimens of a digest according to several methods:—"1. A digest of the mere Statute Law; 2. A digest of the Statute and Common Law, including the decisions of the Courts, but without introducing any alterations; and, 3. A digest or code of the law, introducing such improvements and simplifications as appear desirable, without departing from any general principles of English Law."

The attention of all parties was also to be directed "to the consideration of what improvements may be introduced in the mode of framing and passing future statutes," and each sub-commissioner was further to "prepare a note of his views as to the best mode of carrying out the Lord Chancellor's directions."

After the Board had sat for some months, the chief commissioner determined that the residue of the year of office should be employed in preparing a variety of consolidating Acts on particular branches of the law; and in addition to the Bills stated above, the different sub-commissioners were directed to draw—1st. A Bill to consolidate the Laws relating to the National Debt; 2nd. A Bill to consolidate the Enactments which relate to the Consolidated Fund; 3rd. A Bill to consolidate the Acts which concern the Public Officers of the Civil Service; 4th. An Interpretation Act; 5th. A new Statute of Bills; and, 6th. A new Statute of Apportionment. Mr. Rogers was also instructed to prepare an Analysis of the Public General Acts.

In the course of the year three Reports were published by the Board, containing in the aggregate 634 folio pages.

Now, we venture to assert that the most perverse ingenuity could not have invented arrangements better calculated than are the foregoing to insure the failure of Lord Cranworth's scheme.

In the first place, the attention of the sub-commissioners was directed to such a variety of different objects, that it was impossible for them to bring to maturity any single measure. The expurgatory list of Messrs. Anstey and Rogers was conse-

quently inaccurate and incomplete; Mr. Coode's critical examination of the Statute Book was abandoned in apparent hopelessness; the analysis of the statutes by Mr. Rogers was left in such an unfinished state that it can scarcely be available for any practical purpose; and all the consolidated Bills, without any exception, were, at the termination of the labours of the Board, unrevised and defective, and indeed wholly unfit to be presented to Parliament as fit subjects for legislation. Mr. Ker frankly admits, that "the drafts of new statutes on wills and on apportionments, contributed by Mr. Brickdale," are "in respect of the execution, much more likely to be imperfect than the Acts for which they are substituted;" and then, with reference to the other contributions of the sub-commissioners, he "purposely abstains from making any detailed comments on them," and protects himself by a saving, but somewhat curious statement, that he "does not consider that his responsibility extends to the details and execution of the different Bills prepared and submitted by his colleagues."

With these convenient sentiments we cannot bring ourselves to coincide. Mr. Ker, no doubt, could not be fairly blamed for any incompetency that might be exhibited by the subordinate members of the Board, for they were appointed, not by him, but by the Lord Chancellor. Still he was emphatically answerable for all failures which were caused by the absence of methodical arrangement, and by the inadaptation of means to ends. The work was to be performed under his immediate superintendence, and it was his especial duty to take care that the energies of the workmen were not overtasked. Instead, however, of confining the attention of his colleagues to one subject at a time, so that whatever was undertaken might be thoroughly mastered, and whatever was done might be done well, he allowed, nay, he directed them to fritter away their time, and to dissipate their thoughts with a multitude of incongruous duties. Four men commenced tasks which no twenty men could have completed within the appointed time, and the result was, that at the close of the year of office nothing was forthcoming but a melancholy series of abortive attempts. For this result, as it appears to us, Mr. Ker was mainly, if not exclusively, responsible.

A second striking error committed by the chief commissioner was in allowing Mr. Brickdale to indulge his fancy in the preparation of a code of the Common Law, as well as of the Statute Law, relative to the subject of distress for rent. For all practical purposes connected with the object which the Board was established to effect, that learned gentleman might as well have been employed in composing a Hindustani Grammar; for if any proposition be more clear than another, it is this, that until the Statute Book be consolidated and digested, no attempt to blend in a single code the written and unwritten law on any subject will have the most remote chance of receiving the sanction of the Legislature. Of all men living, Mr. Bellenden Ker had the best reason for being aware of this fact. He was a member of the Commission appointed in 1835 to consolidate the Criminal Law; and the one grand mistake made by that body was, that instead of "digesting into a single statute all the enactments touching crimes," it undertook the ambitious task of "attempting to reduce the whole Criminal Law into one written code." This mistake has cost the country some 70,000*l.*, and has thrown back the cause of consolidation some fifteen or twenty years. Session after session the criminal code has been brought under the notice of the Legislature, but without success; and now, at length, a committee of the Lords has "determined, after mature consideration, that it is inexpedient to press forward any digest, except that of Statute Law, as on every account the step first to be made;" and has recommended that the code should be remodelled, so as to be reduced to a consolidation of the mere Statute Law relating to crime. It is impossible for any one who is aware of these facts to deny that Mr. Ker has been guilty of indiscretion in authorizing a repetition of the error, which has caused such a needless waste of time, of labour, and of money, and which has now been so signally denounced.

The chief commissioner made a third mistake—scarcely less remarkable than that just noticed—when he so entirely misconceived the nature of his office, as to deem it necessary to publish in the short period of one year no less than three separate Reports. He contends, indeed, that "a sufficient jus-

tification may be found for the publication in the natural desire to prove that the commissioners have not been idle, the wish to do justice to all persons concerned, and the expediency of showing that the subject has been looked at in all points of view." But these strange arguments will have little weight with the public, when it is remembered that the Board was appointed not to inquire, but to act; that the members were few, the time short, the funds limited, and the task heavy; and that 634 folio pages could not be written, still less could they be revised for the press, without causing a serious interruption to the most urgent duties of the commissioners. What renders Mr. Ker's conduct the less excusable is, that it was directly opposed to the expressed intentions of the Lord Chancellor. "Hitherto," said his lordship, on the 14th of February, 1853, "nothing has been done beyond reference for inquiry to learned commissioners, who have gone no further than that inquiry;" and he then added, "I do not propose that the persons appointed should inquire how the thing is best to be done, but the course I contemplate is for them to do it." Again, on the 17th March, Lord Cranworth expressed the same sentiments, observing, "that further speculation as to what might be, and what was convenient to be, done, was absurd; that these inquiries had ended, and always would end, in nothing; and that his object was not to inquire what could be done, but to set practically to work to get something really done."

If any additional argument were required to illustrate the inexpediency of publishing these self-contradictory Reports, it would be amply afforded by the Reports themselves; for as specimens of illogical reasoning, presumptuous assertion, unwise suggestion, and futile commentary, they may challenge a comparison with the most useless blue-book that was ever laid on the table of either House of Parliament.

Fourthly, Mr. Ker committed a very grave error in directing Messrs. Anstey and Rogers to prepare their "Expurgatory List" of non-existing statutes on a totally wrong principle. They were "*to commence with the earliest*,"—they were to begin at the wrong end. A little reflection will make this quite plain. Let us suppose that the volume of statutes which contains the

Acts passed in the year 1800 were put into our hands, with instructions to point out which of the enactments had been repealed. In what manner should we perform this task? Clearly our course would be to examine carefully the statutes of each succeeding year, in order to ascertain how far the legislation of 1800 had been modified or reversed by subsequent enactments. Precisely the same process would have to be performed with respect to the Acts of every session, from the commencement of the century down to the present time; and before we could pronounce a safe opinion as to what statutes passed during the last fifty years had been repealed, a large portion of the Statute Book must have been minutely searched fifty times over. It is obvious, therefore, that a task performed in this way would involve an enormous waste of labour; and it is almost equally obvious, that when performed it would still be inaccurate and incomplete. But now let us see what would be the effect if we were to commence operations with the most modern statutes, and to work backwards. We should first take the Acts of last session, and observe how far they modified or repealed the legislation of former years; the results of our investigation would be noted in the prior volumes of the statutes in their proper places. In other words, we should simply perform the process familiar to lawyers of "booking up" the Acts of the session. Proceeding retrogressively in this mode, we should first purge the Acts of the present reign, then those of King William IV., then those of King George IV., and so on: and the advantages we should gain would be threefold—first, we should scarcely ever have occasion to go over the work more than once; next, we should run comparatively little risk of errors; and lastly, we should complete each volume as we retrogressed, and thus enable a reprint of the existing statutes to be effected in the most convenient form,—that is, by degrees.

The principles just explained are so palpable, that it really seems marvellous they should ever have been overlooked. Indeed, Mr. Bellenden Ker himself appears to have had some inkling of them, for, as before stated, he employed Mr. Coode to examine the statutes, "beginning with the latest, for the purpose of ascertaining, exhaustively, what is the law now in

force." Unfortunately, however, the "Chronological Register of the Duration, Action, and Interaction of Acts of Parliament," which was commenced by that gentleman, is so superfluously elaborate, that it rather obscures than simplifies the matter, and "the specimen" printed in the first Report does not awaken any lively regret that the work has not yet been completed.

Another gross blunder with respect to the "Expurgatory List" of Messrs. Anstey and Rogers, is that it is confined to such Acts as are *wholly* repealed, &c., and that it takes no notice whatever of *partial* repeals. Mr. Ker seems now to be fully alive to this error, for in his second Report he observes that the list "ought to be extended, if made at all, to all repealed or expired enactments whatsoever, and not merely to whole statutes;" and he adds, in his third Report, that "it only professes to notice those Acts, the *whole* of which is not now in full force; though it is just as necessary to repeal obsolete provisions, which are intermixed with others not obsolete, as to repeal those which stand alone." This language, which is certainly not that of commendation, seems scarcely just towards Mr. Ker's colleagues, the more especially as we learn, from a note appended to the first Report of the Statute Law Commission, "that it was in accordance with their *instructions* that Messrs. Anstey and Rogers confined the existing list to whole Acts, it having been thought *advisable* that a list of these should be completed first, before a more minute examination of the Statute Book was attempted."

But the master blunder of all remains yet to be noticed; and in order that the full extent of this blunder may be thoroughly comprehended, a few preliminary observations will be necessary.

In any systematic attempt to consolidate the Statute Law, the very first step which obviously ought to be taken, is to ascertain, with as much precision as possible, how much of that law is still in force.

The Statute Book at present consists of forty ponderous quarto volumes, each volume, on an average, containing about a thousand closely-printed pages. The Public General Acts,—independent of some 10,000 Local and Personal Acts, and about

14,000 Private Acts,—are, in round numbers, 17,000, and of these about 10,500 are either obsolete, or have expired, or are expressly or virtually repealed. At least 1,500 more relate exclusively either to Scotland, or to Ireland, or to the Colonies, while of the remaining 5,000 many have been partially repealed, while others have been modified in a greater or less degree by successive legislative changes. It is therefore clear, that if a new edition of the Public General Acts were published, which should contain, first, only such portions of those statutes as are still in force, and, next, marginal references whenever a prior Act had been modified by subsequent legislation, and in which the Acts should be so far classified, that those exclusively relating to Scotland, Ireland, or the Colonies, should respectively be collected in separate divisions,—such an edition would vastly facilitate any measures which might afterwards be taken for the consolidation of the Statute Law. Nor would the advantages derivable from this work be confined to the legislator; for the judge who has to administer the law, the counsel or attorney who has to advise upon the law, and the subject who has to obey the law, would at least be equally benefited, and this in two ways:—First, the labour of ascertaining what the written law enacts upon any particular subject would be lightened, not only in proportion to the diminished bulk of the Statute Book,—which would probably be reduced by the process from forty quarto tomes, to ten or twelve octavo volumes,—but also in proportion to the number of marginal references, which would be appended to all Acts *in pari materiâ*, and to the quantity of doubts which would be solved respecting the repeal or non-repeal of particular enactments. And, next, the accessibility of the Statute Book would be increased to all classes in the same ratio that its cost was lessened. The original price at which the statutes at large have been published exceeds 100*l.*, and although law libraries have of late years much depreciated in value, a good second-hand copy of that work still realizes from 30*l.* to 35*l.* This is justly regarded by all professional men as a serious grievance, and the more so because at least two-thirds of the purchase-money is expended on a mass of "dead letter," which is infinitely worse than useless. A new edition of the statutes, which should

contain only such Acts as are still in force, might, after allowing all reasonable profits to the Queen's printer, be sold for 10*l.* or 12*l.*; and no good reason can be assigned why the Government should not take this matter into its own hands, and publish such an edition on the same terms as other parliamentary papers. It would then cost, at the outside price, some forty or fifty shillings; and the injustice of enforcing laws, which are incomprehensible from their multiplicity, undiscoverable from their complexity, and inaccessible from their costliness, would in a great measure be removed. Surely, if it be the duty of the Legislature to enact good laws, it is equally its duty, or at least it is the duty of the Executive, to take care that the public has ready access to the laws so enacted.

But next, if we turn from abstract reasoning to authority, we find a remarkable concurrence in the opinions of all the eminent men who, from time to time, have offered suggestions respecting the best mode of consolidating our Statute Law. Lord Bacon's sentiments on this subject have been clearly expressed; and in that part of his "Proposal for amending the Law of England" which relates to the reforming and recompiling of the statutes, he suggests, that the first thing to be done is "to discharge the books of those statutes where the case, by alteration of time, is vanished. The like of statutes long since expired and clearly repealed. The next is, to repeal all statutes which are sleeping and not of use, but yet snaring and in force."

The commissioners, who in 1835 reported on the consolidation of the Statute Law, entertained the same views, and recommended as their first remedy, "the rejection from the Statute Book of enactments which have been directly or indirectly repealed, or which are obsolete or otherwise superfluous." "We believe," said they, "that the reduction of the existing statutes by expurgation would not be attended with any inconvenience, and might be effected with perfect safety; and we think that, if it were not deemed expedient at present to attempt a more complete consolidation of the Statute Law, a consolidation to this extent at least ought to be accomplished. It would diminish the bulk and costliness of the present Statute Law; would render it more accessible than it now is; would obviate

the danger arising from repealed and obsolete matter (not easily discoverable to be such in the printed editions of the statutes); and would facilitate the execution of a more perfect consolidation, should such be attempted at any future period."

The opinions of the Lord Chancellor are in entire accordance with these sentiments. "The course I contemplate," said his lordship, on the 14th of February, 1853, "is to say to the members of the Board, Gentlemen, first of all, mark every statute that is now in force, so that we may know precisely of what the Statute Law at this moment consists." On the 14th of March he again explained that "an attempt would be made in the first place to ascertain precisely and exactly of what the Statute Book consisted;" on the 17th of March he repeated with emphasis, that the Board would "first make such an expurgation of the statutes as would show what was and what was not in force." Moreover, a few days afterwards, his lordship drew up a special memorandum, requiring the Board to make it their "first process to ascertain precisely the text of the Statute Law as it then existed, by determining what statutes had been repealed, expressly or virtually; what had expired, and what had become obsolete." "The revived statutes were also to be noticed;" and then the Chancellor went on to say, "The text having been thus examined, a special and detailed report should be made of all repealed, expired, and obsolete statutes; also of those which appear to have been revived, unintentionally, and those which are doubtful. This report will form the groundwork of a Declaratory Bill to repeal, or confirm, such statutes, to be introduced, if possible, at the end of the present session, 1853. All doubts being thus removed, and all unnecessary matter disposed of, the next process will be to devise a plan for the systematic arrangement of the existing Statute Law, according to subjects, and to make a digest. This digest, when made, will be the materials for a consolidation of the existing statutes."

We have referred to these opinions at greater length, because they place in a striking point of view the very remarkable conduct of Mr. Bellenden Ker, who has thought fit to set them entirely at nought, and who has denounced the scheme of a new

authorized edition of the statutes as one which is clearly inexpedient, and indeed quite impracticable. The reasons which have induced the learned commissioner to arrive at this conclusion are given at length in his second Report. The entire document is sufficiently curious, but unfortunately our limits will not permit us to do more than to comment shortly on the most prominent arguments. Mr. Ker commences by hinting a suspicion that "many of those who demand a revision of the statutes"—he leaves us in doubt as to whether the Lord Chancellor is one of the persons alluded to—"do not attach any distinct meaning to the words which they use, or that they expect a result which is not attainable." "It is spoken of," says he, "as a hardship, that a person who wishes to buy a collection of the statutes now in force, is obliged to buy thirty-nine quarto volumes; but it is no fault of the Legislature that those thirty-nine volumes contain, together with the statutes now in force, a vast number which are not; it is only because there is no better edition that the student is obliged to buy the dead matter with the living." This language, which in courtesy may be called reasoning, will not be regarded as quite conclusive by those who remember that Sir William Blackstone, after defining municipal law as "a rule of civil conduct, *prescribed* by the *supreme power* in a state," goes on to declare, that "it is incumbent on the promulgators," that is, the supreme power, to notify the rules prescribed, "in the most public and perspicuous manner; not like Caligula, who, according to Dio Cassius, wrote his laws in a very small character, and hung them up on high pillars, the more effectually to ensnare the people." Whether any natural distinction can be drawn between laws hung up out of sight, and laws buried out of sight in the midst of a confined mass of repealed and obsolete matter, we leave to be determined by Mr. Ker; but even assuming that he is technically right in acquitting the *Legislature* of blame, how is it possible to justify the conduct of the *Government*, which permits the laws to remain in such a chaotic state, that they are practically inaccessible to the community? The learned commissioner comes again to the rescue, with what success will immediately be seen: "I apprehend," says he, "that it is not now considered proper for the

Government to undertake any works, which *can be executed by private industry or enterprise;* and convenient editions of the statutes actually in force, suited to the wants of the public, seem to be of that nature." Can such an argument as this be gravely put forward by any man who is really aware what functions are assumed by the Government of this country? Were it to prevail, what would become of our post-office, of our lunatic asylums, of our dockyards, of our manufactories of arms? All these establishments, and we could cite many more of a similar description, might be carried on by private industry; yet they are very properly considered by the Government to be works of such a national character as to justify their being conducted at the public expense. Besides, it may very fairly be contended that a revised edition of the statutes is not "a work which can be executed by private enterprise," and this for two reasons:—First, no private publisher has ever yet attempted to bring out such an edition, and this negative fact assuredly furnishes good proof that, as a mere commercial speculation, it would not be remunerative; and, next, it is obviously impossible that an edition, emanating from a private press, could be regarded by the public in the light of an authorized edition; and unless it were so regarded, it would be comparatively useless.

Mr. Ker, indeed, contends that "a really authorized edition of the statutes is quite impracticable;" for, says he, "it could not be made a work of superior authority to any other selection or compilation, except by the direct action of Parliament, that is, by *being actually placed on the Statute Rolls.*" How this astounding assertion can be justified we are at a loss to conceive, for we do not entertain the slightest doubt that it is entirely contrary to law. A single illustration will prove that we are right. By the Act of 13 and 14 Vict. c. 16, as extended by sec. 223 of the Common Law Procedure Act, 1852, the judges were empowered to make rules for the regulation of pleading and practice in the Superior Courts. These rules, when made, were to be laid before Parliament, and if not altered within three months, were to have the like force and effect as if they had been expressly enacted by Parliament. Now, it is notorious that the rules promulgated by virtue of

these statutes have never been placed on the Statute Rolls, and yet they have the same binding authority as if they had been established by the Legislature. Then, why should not a similar course be pursued with respect to a revised edition of the statutes? What is to prevent Parliament from empowering and directing certain commissioners, or other persons named, to prepare, within a limited period, a new edition of the Public General Acts now in force, which edition, when printed, should be laid before both Houses, and if not questioned within three months, should be treated as an authorized edition?

If by the term "authorized edition" be meant, as Mr. Ker interprets it, "an edition enacted by Parliament, declaring, both affirmatively and negatively, that those, and those only, are the statutes now in force," some difficulties would doubtless arise, because it would require greater knowledge of the Statute Book than is possessed by any lawyer, however astute, to draw the precise line between the dead and the living law. But this minute accuracy is not required by the advocates for the new edition. They do not contemplate an edition which shall affirmatively declare that every enactment contained in it is in full force at the present day, but all they aim at is a negative declaration that no enactments which are excluded from the edition shall be of any force, except so far as relates to rights and titles acquired, acts done, and liabilities incurred under them. Of course such an edition would be defective in two respects:—First, it would almost certainly contain a few provisions, which, after a searching investigation in a Court of Law, might turn out to have been indirectly repealed; and, next, it would not exclude the necessity of having recourse to the older editions of the statutes at large, in some cases where the question turned on the effect of an act done under an expired or repealed enactment. But, still, after making every reasonable allowance for these admitted drawbacks, no one can seriously contend that the publication of such an authorized edition as we here alluded to would not be productive of signal benefit to the community.

In making this last assertion we mentally except Mr. Bellenden Ker, who is opposed to the entire scheme of a new edition

of the statutes, and who, besides relying on the arguments already noticed, appears to rest his opposition on the following grounds:—First, that "in many cases it is *only difficult*, and not, after sufficient examination, really doubtful, whether a statute has been repealed by or is inconsistent with a subsequent enactment or not;" secondly, because "the greater part of the desired result may be incidentally effected" in the course of consolidation, which he recommends for immediate adoption; and, thirdly, because, if the task were completed, "the result would be comparatively trivial." How this last statement is reconcileable with an admission made by the learned commissioner in the same Report, that a list of all repealed and expired enactments "would probably contain not far from 20,000 entries," we are at a loss to imagine; and we confess our inability to discover the force of an argument which rejects the expediency of resolving doubts, because it is *only difficult* to determine whether they really exist. As to Mr. Ker's proposal of incidentally effecting the desired result by the gradual consolidation or rewriting of the Statute Law, we look upon it in much the same light as we should regard the plan of an engineer who, on being directed to construct a long trunk railway, should employ one body of navvies in excavating a tunnel, and another in erecting a viaduct, before the country had been surveyed or the levels taken, or any plans or sections prepared. The waste of labour consequent on such a mode of proceeding would be ridiculously large. Every draftsman engaged in consolidating the written law on any particular subject would, as a preliminary step, have to examine the forty quarto volumes minutely, in order to ascertain the special enactments with which he had to deal. This operation must needs be repeated as often as a new subject was selected for consolidation; and thus, instead of having the work done effectually, and once for all, by two or three men, the same ground would have to be gone over by as many different workmen as there were different matters to be digested. A compositor might as well determine to distribute the type of a sheet by first selecting all the A's, and then all the B's, and so on through the entire alphabet.

When Mr. Bellenden Ker, after admitting that "it would

appear the more regular and systematic course to ascertain the exact amount of statutes now in force first, and afterwards to group together and consolidate them," undertakes, in defiance of all sound reasoning, and all previous authority, to prove that his plan of consolidation is "the best, if not the only course, that admits of being practically pursued;" he may well state, as he does, that he shall "at any rate prove something, which was not universally felt or admitted before;" and he may reasonably "express a hope that too much will not be expected from the course now proposed of gradually rewriting the statutes."

We have at length done with Mr. Bellenden Ker. We have shown, as we trust, that every step taken by him, with respect to the great work intrusted to his superintendence, has been one in the wrong direction, and that no confidence can be placed in any Board or Commission in which he is allowed to occupy a prominent place. Selected, as we learn from the Lord Chancellor, on account of his "peculiar qualifications, as being practically the only remaining member of the Commission which, in 1835, framed the Report suggesting the mode in which the Statute Law should be consolidated," we find him, in 1854, avowing, as a matter of course, that he did not profess, on his appointment in that year, "to have any detailed working plan ready," nor did he feel called on, before that date, "to consider how what was proposed could be best effected." Unfortunately for himself and for the cause, he subsequently did consider the subject; he arrived at a conclusion directly opposed to the views entertained by the Lord Chancellor, and by three out of his four colleagues, and he gave directions which have resulted in lamentable failure.

Our observations have hitherto been confined to the proceedings of the Statute Law Board; but the Commission by which the Board was superseded must now arrest our attention for a few moments. That Commission was originally appointed in August, 1854, and consisted of eighteen members, viz., the Lord Chancellor, two ex-Chancellors, one lay lord, five superior judges, one ex-Secretary of State, the law officers of the Crown for England, Ireland, and Scotland, an Irish ex-Attorney-General,

and Mr. Ker. In the December following, Mr. Coulson, the draughtsman for the Government, was added to the Commission, and Mr. Brickdale was appointed secretary. Between November, 1854, and June, 1855, eleven meetings were held; and on the 10th of July a short Report was presented, bearing the signatures of fifteen commissioners: Sir Alexander Cockburn, Sir Richard Bethell, Mr. Napier, and Mr. Brewster did not sign the document. At one of the earliest meetings Mr. Ker was appointed "a member of all the sub-committees, for the purpose of superintending the communication with draughtsmen, &c.;" and we infer from a paper printed as an appendix to the Report, that he alone of all the commissioners received 1,000*l.* as salary. Be this as it may, it is clear that he was the principal person employed in carrying out the resolutions of the Commission; and considering the position which he had occupied in the former Board, it is not unreasonable to presume that his opinions might have the effect of modifying the original views of the Lord Chancellor, and that he would have much influence in arranging the order of the subjects to be discussed. We are, therefore, not at all surprised to find that Lord Cranworth, notwithstanding his former sentiments, should suggest to the Commission the propriety of commencing operations by consolidating the written law on particular subjects, and that the first meetings of the commissioners should have been employed in a "general discussion as to the proper method of preparing consolidated statutes." Neither does it excite our wonder that the Report should consist of little more than an enumeration of nine consolidating Bills, which have been commenced or revised under the authority of the Commission,—two or three not very satisfactory reasons for employing feed draughtsmen in lieu of permanent sub-commissioners,—and a subtle disquisition respecting "the exact meaning of the term 'consolidation.'" It is true that we cordially concur in the sentiments expressed by the English Attorney-General, who contended that "the plan of taking by random isolated groups of statutes, and consolidating them into single Acts, was not likely to produce valuable results, or to satisfy the expectations which the public had formed from the appointment of the Commission;" but still, we do not

attach blame to the commissioners, because, so far as we can discover, the subject appears never to have been presented to them in a proper light. Indeed, the whole question respecting the expediency of publishing a new edition of the Public General Acts in force seems to have been studiously withdrawn from their attention. Their Report does not contain a single syllable on the subject; and the only allusions made to it in the "Minutes of Proceedings" are—first, a resolution passed on the 29th of November, "That Mr. Anstey should be employed to prepare for publication a chronological list of all statutes and parts of statutes now repealed; and that Mr. Ker should communicate with him on the subject, and instruct him as to the details of the work;" and, next, a resolution of the 10th of January, "That the plan must be abandoned for the present." It will be observed that this list was to be of a totally different character from the "Expurgatory List," which was originally prepared by Messrs. Anstey and Rogers. It was to be confined exclusively to repealed enactments, and was to take no notice of either obsolete or expired Acts; neither was it to form the basis of any authoritative edition of the statutes. Under these circumstances, Mr. Anstey was perfectly justified in expressing a doubt whether the time and labour required for its preparation might not be better employed; and the commissioners were right in abandoning the plan. Mr. Ker, who furnished the instructions for this comparatively useless list; is the only person who really deserves censure.

But although, for the reasons just given, we cannot, in justice to the commissioners, hold them responsible for continuing an error which originated elsewhere, and was never brought prominently under their notice, we shall be excused for suggesting a grave doubt whether a Commission constituted like that to which they belong is fit for the work that has been intrusted to it. Most of the members are lawyers who hold high judicial or official positions, and whose time is fully occupied with arduous public duties; while the remainder, with one or two exceptions, are eminent men, who cannot fairly be expected to bestow much thought on so repulsive a subject as the consolidation of the law. They are therefore, of necessity, compelled to work by

proxy, and the extent of the aid which they derive from others must depend upon the amount of the funds at their disposal. Their subordinate agents are stimulated by no hope of fame, and merely perform the tasks allotted to them in the cold spirit of a pecuniary bargain.

We are persuaded that this is altogether wrong. The only wise mode of proceeding is to appoint men, who should be bound to give their undivided attention to the work. They should possess the vigour and knowledge of middle life; they should be remunerated liberally; and, above all, they should have no persons placed over their heads, who, without sharing equally in their labours, would inevitably rob them of their well-earned fame. The

"Hos ego versiculos feci, tulit alter honorem,"

will not do in such an undertaking as a consolidation of the statutes. The men who actually do the work must be permitted to enjoy the honour, as they must be bound to bear the responsibility of bringing it to a successful termination.

Having now given our reasons at length for withholding our confidence, both from the Board and from the Commission, it remains for us to state shortly, first, by whom, and next, in what manner, the consolidation of the statutes can, in our opinion, be best effected. As to the persons who should be entrusted with the work, we are clearly of opinion that the cause of consolidation would be most effectually promoted by the appointment of a Minister of Justice, or Secretary of State for Law. One of the principal duties which would devolve on such an officer would be the reduction of the written law into an intelligible and manageable form. He would be aided by a permanent official staff, whose energies, in common with his own, would be sustained by a sense of responsibility, and be stimulated by a feeling of honourable ambition. He would have leisure to attend to the task; he would feel proud of performing it well; and what the Lord Chancellor has taken up as a mere labour of love, would with him be a labour of duty, on the efficient performance of which he would know that his public character was staked. We have reason to believe that strenuous efforts

will be made in Parliament during the present session to establish a department of justice, and we earnestly hope that all law reformers, who have at heart the consolidation of the statutes, will use whatever influence they may possess in furthering that desirable object. Should this attempt, however, be for the present unsuccessful, the next best course to pursue will be to induce Parliament to follow the precedent set in 1816, and to sanction the appointment of a Board of three Commissioners to execute the work. They must, of course, be men of high professional attainments and of acknowledged abilities, so that the public may place confidence in their labours; they must, unlike Mr. Bellenden Ker, relinquish all other avocations, and give themselves up to the task heartily and entirely; and in order to deprive them of all means of shirking responsibility, they should be allowed to name their own staff of assistants and clerks.

With respect to the best mode of consolidating the statutes, we have already intimated our views with tolerable precision; but as the question is one of great importance, we have deemed it desirable to collect our principal suggestions at the end of this long Report, and to throw them into the shape of resolutions:—

Resolved—1st. That the publication of a revised and authorized edition of the Public General Acts now in force should be the first step taken towards the consolidation of the Statute Law.

2nd. That from such edition should be excluded, as far as possible—

1. All private Acts.
2. All local and personal Acts.
3. All Acts and parts of Acts which have become obsolete.
4. All Acts and parts of Acts which have expired.
5. All Acts and parts of Acts which have been either expressly or impliedly repealed.

3rd. That from every Act inserted in such edition, shall be expunged the preliminary formula expressing the authority by which the Act has been enacted; and also, so far as can conveniently be done, the formal expressions of enactment attached to each section.

4th. That to every Act inserted in such edition, which has been modified by subsequent legislation, a marginal reference should be appended, specifying the particular enactment by which the modification has been effected.

5th. That the Acts inserted in such edition should be classified in four separate divisions, viz.:—

1. Those relating either to the United Kingdom generally, or to Great Britain, or to England and Ireland, or to England exclusively.
2. Those relating exclusively to Scotland.
3. Those relating exclusively to Ireland.
4. Those relating exclusively to India, the Colonies, or the other dependencies of the Crown.

6th. That in the 2nd division, containing the Scottish Acts, should be inserted in their order the titles of the Acts relating either to the United Kingdom, or to Great Britain, with references to the places in the 1st division, where such Acts are printed at length.

7th. That in the 3rd division, containing the Irish Acts, should be inserted the titles of the Acts relating either to the United Kingdom, or to England and Ireland, with similar references.

8th. That in the 4th division, containing the Indian and Colonial Acts, should be inserted the titles of the Acts relating to the United Kingdom, with similar references.

9th. That each division should be provided with a proper index of matter, to facilitate reference.

10th. That in preparing the edition three draughtsmen should be principally employed, each having the assistance of one or two copying clerks.

11th. That each of these draughtsmen should perform the entire work separately; but that all of them should proceed on the same plan, and that the results of their labours should be from time to time compared.

12th. That the plan adopted should be for each draughtsman to commence with the last volume of the statutes, and work backwards, expunging therefrom all enactments which ought to be omitted from the edition, classifying the Acts according to the

fourfold division just mentioned, and booking up in the preceding volumes the effect of the year's legislation on former statutes.

13th. That each draughtsman should prepare a list of obsolete enactments, and that these lists should be verified by comparison with each other.

14th. That each draughtsman should prepare a list of enactments, respecting the repeal of which doubts may be entertained; and that these lists should be verified by comparison with each other.

15th. That each draughtsman should prepare a list of enactments respecting the revival of which doubts may be entertained; and that these lists should be verified by comparison with each other.

16th. That in the event of any doubt existing as to whether a particular Act be a "Public General Act," or a "Local and Personal Act," it should be inserted in the edition.

17th. That before the new edition be actually printed, recourse must be had to the Legislature to repeal the obsolete laws, and to resolve doubts as to the repeal or revival of the particular enactments specified in the respective lists.

18th. That, to confer on the new edition, when completed, proper legislative authority, an Act must be passed to declare—first, that no public general enactment which is not inserted in that edition, and which has been passed prior to its date, shall be of any force or effect, except so far as it may relate to acts done, rights and titles acquired, or liabilities incurred under it; and, secondly, that the omission of the preliminary formula, "By the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same," or of any like formula; and the omission of such introductory words as, "Be it enacted," or "Be it further enacted by the authority aforesaid," or the like expressions, shall not in any respect be deemed to have lessened the authority, or to have altered the effect of the Acts inserted in that edition.

19th. That after the new edition has been published, the next

step should be to prepare a detailed and systematic analysis of its contents, in order that the different statutes relating to different subjects should be placed in separate groups.

20th. That after the statutes have been so grouped, each group should be consolidated.

21st. That when all these works have been completed, another edition of the statutes, embodying the improvements, shall be prepared and published under the authority of Parliament.

If it be urged in opposition to the above scheme, that it contemplates a variety of successive changes in the written law, and that the first edition proposed will be rendered useless by the second,—our answer is, that no other means can be adopted to remedy the gigantic evils of which we all complain The law reformers of New York, stimulated, as they were, by the ardent desire of the Legislature and of the public to possess a code, felt themselves constrained to adopt this gradual mode of proceeding; and it was not until their statutes had been several times revised, that they arrived at their present state of consolidation. Our Statute Law Commissioners have wisely observed on this subject, that "it is not necessarily an objection to a proposed improvement, to say that, when completed, it will only be made the foundation of a further improvement; but if an intermediate step be of itself a useful one, and the more perfect work cannot be hoped for until after a long interval, such step ought, in common prudence, to be taken."

Notes of Leading Cases.

EQUITY.

INTERPLEADER—INSURANCE COMPANY—MORTGAGOR AND MORTGAGEE OF A POLICY OF INSURANCE.

Dessborough *v.* Harris, 3 Eq. Rep. 1058.

LORD REDESDALE, in his work on *Equity Pleadings*, thus states the doctrine of Interpleader in equity:—"Where two or more persons claim the same thing by different or separate interests, and another person, not knowing to which of the claimants he ought of right to render a debt or duty, or to deliver property in his custody, fears he may be hurt by some of them, he may exhibit a bill of interpleader against them." This definition of the equitable doctrine of interpleader, has not been impeached as far as it goes. Any case which does not come within it is not a case for interpleader, though doubtless it would include many cases in which the Court would not allow a bill of interpleader to be filed. Thus, it was decided in Moore *v.* Usher (7 Sim. 383), that where the depositary of a fund has a *personal* interest in contesting a question relating to part of the fund with one of the claimants of it, he cannot file a bill of interpleader. "It is essential to the character of a plaintiff in such a bill," said Sir L. Shadwell, V. C., "that he should have no personal interest." So where there was a question between an insurance society who filed a bill of interpleader, and defendants who were executors of a person whose life was insured, as to interest on the amount of the policy, the same learned judge held that interpleader did not lie. Again in Diplock *v.* Hammond (2 Sma. & Gif. 141), the stakeholder having alleged that the fund in his hands was less than one of the claimants asserted to be its amount, Sir J. Stuart, V.C., held upon the same principle that a bill of interpleader could not be maintained. Most important additions to the test proposed by Lord Redesdale, are these further particulars, viz. that the plaintiff himself must not claim any personal interest in the fund, and that no question as to the amount of the fund exists between him and any of the defendants to the bill. It has also been more than once suggested from the Bench that where the conflicting claims have been at all occa-

sioned by the plaintiff, the Court will not relieve him. "If," said Lord Cottenham, in Crawshay *v.* Thornton (2 Myl. & Cr. 1), "there be a double claim, which has been occasioned by the act of the party seeking interpleader, he cannot have relief from the Court." Nor can a bill for interpleader be maintained where the claims are merely equitable, nor can it be extended to collateral demands arising out of the right immediately in dispute—Barclay *v.* Curtis (9 Price, 661). Again, there is no interpleader between landlord and tenant, or principal and agent, because rights and liabilities exist between the parties, independent of the title to the property, or the debt or duty, in question, and which may not depend upon the decision of the question of title. See per Lord Cottenham in Crawshay *v.* Thornton (2 Myl. & Cr. p. 20), and Watts *v.* Hammond (3 Eq. Rep. 641). Perhaps the definition given by Sir John Leach, Mitchell *v.* Hayne (2 Sim. & Stu. 63), is as complete as it may be in so few words. It was as follows:—"Interpleader," said his honour, "is where the plaintiff is the holder of a stake, which is equally contested by the defendants, as to which the plaintiff is wholly indifferent between the parties, and the right to which will be fully settled by interpleader between the defendants."

The whole subject has recently been before the Court in the case of Dessborough *v.* Harris, in which the Lord Chancellor expressly dissented from Fenn *v.* Edmonds (5 Hare, 314), which has been regarded as an important decision upon the question. In the latter case, the Asylum Assurance Company received notice of mortgage, by an insurer, of the policy which the Company had granted, after which the insurer became bankrupt. Soon after the death of the person whose life was insured, the mortgagee applied for payment of the sum due upon the policy, and not being paid, brought his action for the same in the name of the bankrupt. The Company thereupon applied to the assignees of the bankrupt whether they would have any objection to the payment being made to the mortgagee, or if they would concur in the discharge to the Company. The assignees were merely passive, and the question simply was, whether the Company was entitled, under the circumstances, to file a bill of interpleader against the mortgagee, the bankrupt, and his assignees. Sir J. Wigram, V.C., held that he was so entitled, and that the assignees, who had in the suit shown no title to the policy, must pay the costs. "Looking to the nature of the security, and the property which it comprised [it comprised other property besides the policy], and the right of action against the Insurance Company; looking also to the correspond-

ence which took place before the bill was filed, and to the answers of the assignees in this suit, which do not exclude their claim, I cannot say that the Company might not have been liable to pay the sum due upon the policy a second time, if they had not instituted this suit." The case of Dessborough *v.* Harris is not very dissimilar to that of Fenn *v.* Edmonds. It was as follows:—H. insured G.'s life in the Atlas Company for 3,000*l.*, payable to H. on the death of G. Immediately afterwards H. assigned the policy to Messrs. T., bankers, as security for a loan, which was also secured by a mortgage of real property, and the Atlas Company got notice of such assignment. H. subsequently took the benefit of the Insolvent Debtor's Act, and all his property passed to S., the provisional assignee; G. died in January, and in the December following the Atlas Company filed a bill, alleging that H. and S. disputed the right of Messrs. T. to receive the money due on the policy, the bankers having commenced an action against the Company in the name of H. It appeared that S. refused to consent to the bankers receiving the money, but offered no opposition. The case was heard originally before Sir W. Wood, V.C., but is not reported. Lord Cranworth, however, when it came before him on appeal, observed:—"I collect from the note of Vice-Chancellor Wood's judgment, that he entertained great doubt as to the decision in Fenn *v.* Edmonds, and that he ultimately decided this question [by a decree for the plaintiff] on the ground that Mr. Sturgis (the provisional assignee) had made a claim. But I find that the attorney for the bankers represents Mr. Sturgis as saying that 'in equity no doubt the bankers were entitled to the money owing on the policy, and if they could satisfy the Insurance Company, and get the money without his concurrence, he would offer no opposition.' He merely declined to consent, but offered no opposition. He never disputed the right of the bankers to the policy and the moneys payable thereunder, but merely left them to make out their claim. I consider that this passive conduct did not justify interpleader."

The only possible claim adverse to the bankers was that of S., the provisional assignee; H. had no beneficial interest in the policy, for his right of redemption passed to the provisional assignee by the insolvency; we find that S. was merely passive, and that even his claim was only after the bankers were satisfied, inasmuch as the assignment to them was not disputed; the question, then, was reduced to this,—Could the Atlas Company compel the bankers, and H. or S., to interplead, simply because the bankers were mortgagees of the policy? On this point the Lord Chancellor observed,—"The mere fact that the assignee

was a mortgagee only, does not of itself give any right to call on the assignor and assignee to interplead. The two claims are not conflicting. I do not say that a mortgagor might not by his conduct make a case in which a debtor might file a bill of interpleader against him and his mortgagee; if, for instance, the mortgagor gave notice to the debtor that since the mortgage he had satisfied the demand of the mortgagee, so that the assignment by way of mortgage was no longer in force; but without some such claim—setting up what in substance was a claim, independent of his character as mortgagor—no right would exist in the debtor to call on the original creditor and mortgagee to plead." After remarking upon an objection that there was no declaration that the receipts of the mortgagees should be discharges, which his lordship thought unimportant, as the nature of the transaction necessarily implied such a power, he continued,—"I cannot follow Fenn *v.* Edmonds, which appears to proceed on the presumption that assignees in bankruptcy are bound to be active in confirming a prior assignment made by the bankrupt, if called on for the purpose by the person who has to pay; or, if not, that they may be treated as setting up a claim to what has been assigned. I find no warrant for such a doctrine. It is, in truth, a further assurance which is asked for, which, except by special contract, no one is bound to make." His lordship, therefore, thought that this was not a case for interpleader; but we presume that where notice has been served upon a company by a provisional assignee not to pay the assignee of a policy of assurance, and he takes any active steps to litigate his rights, a bill of interpleader may still be filed by the company. Where the provisional assignee has not waived his right under the warrant of attorney to confess judgment (which every insolvent is obliged to give before adjudication on his insolvency), or forfeited it by allowing a great lapse of time without taking any steps to enforce the warrant of attorney, it may be a question whether the mere fact of the provisional assignee having received a warrant of attorney to take effect against the future acquired property of the insolvent, would entitle the company to file a bill of interpleader. The question of the rights of an assignee in insolvency under his warrant of attorney was discussed very much in Hawker *v.* Hallewell (2 Sma. & Gif. 498). There the eldest son of a tenant in tail, male in remainder, subject to a life estate, in 1842 obtained the benefit of the Insolvent Debtors Act. He gave the usual warrant of attorney; in 1853 became tenant in tail in possession, and immediately executed a disentailing deed, and for valuable consideration, vested the fund in trustees

for himself for life, with remainder over. Judgment on the warrant of attorney was not entered up until after the date of this settlement. A suit was instituted to administer the trusts of the settlement. The Vice-Chancellor Stuart, before whom the cause came on for hearing, having stated his opinion that the 37th section of the 1 & 2 Vict. c. 110, did not vest in the assignee the expectancy or possibility which the insolvent had, proceeds—"It is said, however, that in 1853 the right was acquired by the son [the insolvent]; and that in August, 1843, when his father died, he became tenant in tail in remainder; and that under the 87th section of the Insolvent Debtors Act there are provisions which direct that the insolvent shall give an authority to the assignee, by warrant of attorney, to enter up a judgment against him. That authority was given before the insolvent's final discharge. If a judgment had been entered up *at the time* under that authority, there might have been strong ground for sustaining the claim of the assignee under such a judgment. But although there was authority to enter up a judgment, the judgment was not in fact entered up at any time before the right or title of the insolvent to the property accrued in possession; and therefore there was no right which the assignee could assert. . . . This view of the effect of the warrant of attorney is confirmed by the direction in the Act, that an order of the Insolvent Court must be obtained to authorize the judgment to be entered up. This shows that the entering up the judgment is not a matter of course. It cannot be right to attribute the same effect to the warrant of attorney alone as if an order had been actually obtained, and the judgment had been actually entered up upon it. If a provisional assignee sleeps upon his rights for ten years, and does not enter up judgment during that time, it seems a wise and just provision of the Act which enables the Court to hold that the mere existence of a warrant of attorney under the 87th section has not the same effect as if a judgment had been actually entered up."

Therefore, in the case of a man insuring his own life after his insolvency, and dying in ten years, during which the assignee never entered up judgment on the warrant of attorney, it would seem, from Hawker *v.* Hallewell, that the assurance company might safely pay the amount of the policy to the personal representative of the insurer, and in that case could not be entitled to file a bill calling upon the personal representative and the assignee in insolvency to interplead, inasmuch as the latter by his own *laches* had forfeited his rights.

Sale or Gift by Client to Solicitor.

Tomson *v.* Judge, 3 Drew. 306.

"As to the cases of purchases by solicitors from their clients, there is no rule of this Court," observed Vice-Chancellor Sir R. Kindersley in the present case, "to the effect that a solicitor cannot make such a purchase. A solicitor can purchase his client's property, even while the relation subsists; but the rule of the Court is that such purchases are to be viewed with great jealousy, and the onus lies on the solicitor to show that the transaction was perfectly fair; that the client knew what he was doing, and in particular that a fair price was given, and of course that no kind of advantage was taken by the solicitor. If the solicitor shows that the transaction was fair and clear, there is no difference between a purchase by him and by a stranger." In this case, the evidence showed that Chamberlayne, the client, was on terms of great friendship with Judge, the solicitor; that he had induced Judge to commence practice in the neighbourhood where he lived, by promises of support and patronage; and that some months before his death he executed a deed of conveyance to Judge, which was expressed to be in consideration of 100*l.* for the purchase-money, and contained the usual receipt and covenant for title. The only evidence, independent of the deed, was that of Judge himself. He said that the transaction was never meant as a purchase, but as a gift, and that the consideration was merely nominal, no money having passed. Judge himself acted in the matter as solicitor, and no other was employed. The property had cost the client 1,200*l.*, and was admitted to be worth that sum at the least. It was urged on behalf of Judge that it was intended as a gift, and that the intention of bounty being clearly proved, it would not be disregarded because there was on the deed a statement not strictly consistent; and, further, that the relation between the parties here was not that of a mere solicitor and client, but that of a patron and *protégé*, Chamberlayne having placed himself *quasi in loco parentis*. Having stated the rule of the Court as above, in respect of purchases by solicitors from their clients, the Vice-Chancellor proceeds: "Is the rule with regard to gifts precisely the same, or is it more stringent? Less stringent it cannot be. There is this obvious distinction between a gift and a purchase. In the case of a purchase the parties are at arms' length, and each party requires from the other the full value of that which he gives in return. In the case of a gift the matter is totally

different, and it appears to me that there is a far stricter rule established in this Court than with regard to purchases, and that the rule of this Court makes such transaction, that is of a gift from the client to the solicitor, absolutely invalid. To this distinction Lord Justice Turner refers in Holman *v.* Loynes, 18 Jur. 839, when he says, 'The rules against gifts are absolute, and against purchases they are modified.'" His honour referred to Welles *v.* Middleton (1 Cox, 112), Hatch *v.* Hatch (9 Ves. 292), Lady Ormonde *v.* Hutchinson (13 Ves. 47), and —— *v.* Downes (18 Ves. 127), as supporting the doctrine enunciated by him. The rule being thus clear and unambiguous, the only question that can be fairly discussed in cases similar to the present, is what constitutes the relation of solicitor and client; what number of transactions—and for how long a time—and how shortly before the particular transaction which has been impeached—are sometimes important considerations. In this case, it was not attempted to be denied that the relation of solicitor and client, which had subsisted for years before the dealing complained of, continued to subsist throughout it, and down to the death of Chamberlayne. Judge was therefore declared a trustee for the plaintiff in the suit, which was for administration.

Short Notes of Cases.

EQUITY.

Mortmain.

Alexander *v.* Brame, 19 Jur. 1032.—Ware *v.* Cumberlege, 24 Law J. Chan. 630.—Edwards *v.* Hall, 17 Jur. 593; and on appeal, 19 Jur. 1189.—Incorporated Church Building Society *v.* Coles, 1 Kay & Joh. 145; and on appeal, Weekly Rep. 1854-5, p. 396.

Various points of interest in the law of mortmain have been discussed in these cases. In that last cited (Incorporated Church Building Society *v.* Coles), the question turned upon the statute 43 Geo. 3, c. 108, which was passed for the purpose of "promoting the building, repairing, or otherwise providing of churches and chapels, and of houses for the residence of ministers, and the providing of churchyards and glebes." The statute empowers persons by deed or will executed three calendar months before the death of the grantor or testator, to alien land not exceeding five acres, or goods and chattels not exceeding in value 500*l.*, for the erecting, rebuilding, repairing, purchasing, or providing any church or chapel of the united Church of England and Ireland. The testator in the cause gave to trustees two freehold houses in Brighton upon trust for sale, the purchase-money to be invested, and the dividends paid to his wife for her sole use and benefit during her life, and after her death, to make over and transfer the principal sum to the Incorporated Society for promoting the enlargement of buildings, repairing of churches, &c. The question in the suit was whether this devise to the society, which was void under the Mortmain Act, could be maintained under the authority of the statute 43 Geo. 3, c. 108. The Vice-Chancellor Wood was of opinion that the devise could not be supported—that a sale of property and the devotion of the proceeds were not authorized by the terms of the Act, the scope and object of which was that either land or money should be given. The Lord Chancellor, when the case was before him on appeal, agreed with Sir William Wood, observing that the land must be specifically enjoyed. Both learned judges were also of opinion, that the gift was wholly invalid, and that the plaintiffs did not take even to the extent of 500*l.*

Alexander *v.* Brame, a somewhat novel case on the subject of mortmain, was originally heard before the Master of the Rolls; but it was not necessary for his Honour to express any opinion as to whether the charitable gift was good or not, a preliminary question having been raised, viz., was the instrument making the gift testamentary? The case was as follows:—A person executed a deed by which, after reciting his desire to found certain charities thereinafter mentioned, he covenanted that he would within twelve months from the date thereof invest a sum of money in the names of trustees, or in case he should not in his lifetime invest the said sum, then that his executors or administrators within twelve months after his decease (subject to the payment of debts and legacies, if any), should invest the same amount in the names of trustees for certain charitable purposes. The covenantor died without performing the covenants, leaving assets consisting chiefly of chattels real. The Lords Justices, on appeal, held that the deed was not void under the Mortmain Act. "The fact of the assets consisting chiefly of chattels real, at the death of the testator," said Knight Bruce, L. J., "was merely an accident. During the five years the testator had lived, he might at any time have parted with the whole of his chattels real, and his executors might have done the same. The covenantees had no remedy but an action for a breach of covenant, in case the executors refused to pay the debt, nor could they at law have called upon the executors to appropriate any particular kind of property, any more than any other creditor would have done." "That the deed was not within the words of the statute," said Turner, L. J., "is clear. The deed neither conveyed real estate nor effected a charge or incumbrance on any. It merely created an obligation, to be performed by the covenantor or his executors within a limited time, but left him at liberty to deal with the property as if the deed had never been executed." His Lordship considered that the Court ought not to look at the state of the testator's assets at the time of the testator's death, forasmuch as the deed had not professed in any way to bind his chattels real, and also because the state of his property at the time of his death could not determine the validity of the instrument at the date of its execution. It was strongly insisted upon by the counsel for the next of kin, that the gift was bad because chattels real and real estate might be taken in execution upon a covenant, when put in suit and judgment was obtained upon it; and in reference to this argument, Turner, L. J. observed that, "although there might be a doubt whether the charity could hold the land when it was taken, at all events this was the consequence of

the remedy which the law gave for enforcing debts; and there were no decisions that a debt gave an interest in the land, merely because the remedies for enforcing it might be against the land."

In Ware *v.* Cumberlege, the Master of the Rolls held, that shares in the Grand Junction Water Works Company were within the provisions of the Mortmain Act; Wood, V. C. in Edwards *v.* Hall, had held they were not. Myers *v.* Perigal 2 De G. Mac. & Gor. 599, is the leading authority on this head of the subject of Mortmain, viz., whether shares in joint-stock companies possessing land are within the statute. In that case, Lord St. Leonards decided that a bequest of shares in a joint-stock bank, the assets of which by its deed were to be deemed personal estate, and which consisted of freehold and copyhold estates, was not within the Statute of Mortmain. "The true way to test it," said his Lordship, "would be, to assume that there is real estate of the company vested in the proper persons, under the provisions of the partnership deed. Could any of the partners enter upon the lands, or claim any portion of the real estate for his private purposes; or if there was a house upon the land, could any two or more of the members enter into the occupation of such house? I apprehend they clearly could not; they would have no right to stop upon the land; their whole interest in the property of the company is with reference to the shares bought, which represent their proportions of the profits. No incumbrancers of any individual member of the company would have any such right. In short, a member has no higher interest in the real estate of the company, than that of an ordinary partner seeking his share of the profits out of whatever property those profits might be found to have resulted." In thus expressing his opinion, Lord St. Leonards agreed with the Court of Common Pleas, to which the case had been referred for its opinion.

Myers *v.* Perigal, however, was the case of a self-constituted joint-stock company, but the Grand Junction Waterworks Company (about shares in which the question arose in Edwards *v.* Hall, and Ware *v.* Cumberlege), was incorporated by Act of Parliament. In the argument of the case, before the Master of the Rolls, it was suggested that there was a distinction between an incorporated company holding an interest in land and an association of individuals, viz., that the fact of incorporation alters the nature of the interest of the shareholder. The Master of the Rolls considered this distinction as too fine, and as likely to lead to great difficulties. "It is a singular position," said his Honour, "to say that the members of an

incorporated company interested in land do not hold the land itself in their individual character, and to contend, under the shadow of the corporate name, that that which they possess by one name is not the same thing as it would be if held by another. I am of opinion that this is a company whose substantial interest and dealing is with land, and that its shares therefore fall within the provisions of the statute."

The decision of the Master of the Rolls in Ware *v.* Cumberlege was not appealed against; but exactly the same question was decided the other way by the present Lord Chancellor in Edwards *v.* Hall. Alluding to Myers *v.* Perigal, Lord Cranworth said, "If that be the law as to shares in a company not incorporated by charter or Act of Parliament, it must be so as to shares in companies which are so incorporated, and where the lands are held by the corporation itself, being a body, in theory at least, distinct from the shareholders of which it is composed." Nor did he think that any distinction could be made as to these shares, by reason of there being no clause in the Act which incorporates the company declaring the shares to be personal estate. It was also decided, both by the Vice-Chancellor and the Court of Appeal, in Edwards *v.* Hall, that arrears of rent do not constitute an estate or interest in land, and are therefore not within the Statute of Mortmain.

EXECUTOR RETAINING MONEY UNINVESTED.—PRINCIPLE ON WHICH HE IS CHARGED INTEREST.

The Attorney-General *v.* Alford, 4 De G. Mac. & G. 843.

A testator by his will directed his executor and trustee to apply the residue of his personal estate to a charity, and died in 1840. There was a considerable residue, consisting of Bank Annuities and money; and the executor from time to time invested the money in Consols in his own name, but meanwhile paid it into his own private account at his banker's. He never informed the trustees of the charity of the legacy; but for several years he did not receive the dividends on the stock. When proceedings were threatened against him on behalf of the charity, he paid into court, under the Trustee Relief Act, an amount equal to what would have been coming to the charity if he had made proper investments of the testator's moneys as they were received by him. An information was filed against him on behalf of the charity, and a decree was made by the Vice-Chancellor Stuart, declaring that the defendant was chargeable with interest at 5 per cent. on the sum found to have been in his hands on taking the account in 1843, and on

the half-yearly dividends from time to time receivable on the Bank Annuities left by the testator, and ordering that annual rests should be made, and that the defendant should be charged with interest at the same rate upon the cash-balances which were in his hands from time to time in respect of the testator's money which was not invested. When the case was heard upon appeal, the Lord Chancellor, after remarking upon the indefinite character of the rule which the Court had recognised in similar cases, proceeded to say:—"What the Court ought to do, I think, is to charge him only with the interest which he has received, or which it is justly entitled to say he ought to have received, or which it is so fairly to be presumed that he did receive, that he is estopped from saying that he did not receive it. I do not think there is any other intelligible ground for charging an executor with more interest than he has made, than one of those I have mentioned. Misconduct does not seem to me to warrant the conclusion, that the executor did in point of fact receive, or is estopped from saying that he did not receive, the interest; or that he is to be charged with anything he did not receive, if it is not misconduct contributing to that particular result." His lordship considered that though the executor, in not communicating with the trustees of the charity, had grossly misconceived and neglected his duty, yet he was accountable only for the original money and the dividends received upon the Annuities, with simple interest at four per cent., on the ground that it was quite clear that he had not made a profit. If there was evidence, however, that he had kept the money fraudulently in his hands, meaning to appropriate it to himself, it appears that the Court would have inferred that he used it in speculation, by which he either did make five per cent., or ought to be estopped from saying that he did not, and would have made a decree accordingly.

Exoneration.

Bond *v.* England, Weekly Rep. 1854-5, p. 648.

J. E., an owner of real estate, mortgages it and dies intestate, leaving real and personal estate. E. E., his father, was his his heir-at-law and sole next of kin. He died intestate, and without having taken out administration to J. E., or dealing with his real estate. The real estate then went to the heir-at-law of E. E., and another person became his personal representative. The question, as between the real and personal representatives of J. E. and E. E. was, whether the personal estate was to be applied in discharge of the mortgage debts, in

exoneration of the real, or whether the real estate was primarily liable? Wood, V.C., held that the real estate was exonerated from payment of the mortgage-debts created by J. E. "Upon the whole," said his Honour, "the cases do not go the length of showing that in a case like this the burden of the mortgage was upon the land, and the next of kin of the second intestate was not in a position to call upon the administrator of the first for the distribution of the fund till the mortgage-debt had been paid."

SPECIFIC PERFORMANCE.—NOTICE TO TREAT BY A RAILWAY COMPANY.—PLEADING.

Hill *v.* The Great Northern Railway Company, 5 De G. Mac. & G. 66.

The plaintiff, who was the grantee of an annuity charged on land taken by the defendants, by his bill stated, that before the grant of the annuity the land was subject to a mortgage in fee, which had since been paid off, but that there had been no reconveyance; that the defendants had given the plaintiff notice to treat, but without further proceedings had taken possession of the land. The bill prayed that the defendants might be decreed to pay the arrears of the annuity, and to secure future payment. The defendants relied upon their having bought the land under a title paramount, so as wholly to destroy the plaintiff's interest. At the hearing before the Vice-Chancellor (Kindersley), the case was argued on the assumption that it was in effect a suit for specific performance of a contract express or implied, and his Honour, without deciding that question, held that the plaintiff, on account of his having been served with the notice to treat, was entitled to the relief asked. When the case came before the Lords Justices, on appeal, both their Lordships were of opinion that it could not be considered as a suit for specific performance. "The bill, if maintainable at all," said Turner, L.J., "can be maintained only on one or other of these two grounds; either that it is a bill for specific performance of a contract to purchase the plaintiff's interest in the land upon which his annuity is charged, or that it is a bill complaining that the defendants have taken away the plaintiff's security for the payment of his annuity. With respect to the bill being for specific performance of such a contract, I observe it deals with the annuity as a subsisting annuity. It does not treat the matter as an agreement by the company to purchase the plaintiff's interest in the land, but as an entry into possession of the land by the company without title, the company being stated to have purchased from a person whose incum-

brance had been satisfied. So far, therefore, is the bill from treating the plaintiff's interest as having been purchased, that it treats the annuity as a subsisting interest, to which the company is subject by reason of their purchase of the land. This is inconsistent with a contract for the purchase of the plaintiff's interest in the land." It was therefore held, that the plaintiff could not by such a bill enforce a specific performance of the notice to treat, as being a contract to purchase the plaintiff's interest. In reference to the efficacy of the prayer for general relief in such a case, the same learned judge remarked: "It is true that in cases in which plaintiffs are not entitled to the relief specifically prayed, and the relief to which they are entitled is consistent with the facts stated in the bill, the prayer for general relief is called in aid to give the plaintiffs the relief to which they are really entitled, but this is never done where the case stated by the bill is inconsistent with the relief which is asked under the general prayer."

Void Condition.—Public Policy.

Benn *v.* Griffiths, Weekly Rep. 1854-5, p. 640.

A testator by his will gave 200*l.* per annum to his niece, who was a married woman, then living separate from her husband, "for and during the time she may continue to live separately from her said husband." The will stated that the annuity was fixed at 200*l.*, in consideration of the testator's niece being reduced to the necessity of separating from her husband, and being thus left without his protection, &c.; but as it was possible that she might consent again to live with him, the will of the testator was that the annuity might in that case be reduced to 100*l.* for her sole and separate use. The lady and her husband having come together again, a question arose whether the condition annexed to the gift was good or not. Vice-Chancellor Wood considered the condition void on the ground of public policy, involving as it did, the continuance of a state of separation between husband and wife, which, according to the theory of the law, could not exist without injury to the general interests of society.

Charitable Trusts Act, 1853.—Lands Clauses Consolidation Act.

In *Re* Lister's Hospital, Weekly Rep. 1855-6, p. 156.

An important point of practice, on which there was previously great difference of opinion among the different branches of the Court, was settled in this case, viz., that in a petition for payment, out of Court, of purchase-money for charity lands, and

for general purposes of the charity, the previous consent of the Charitable Trusts Commissioners is not necessary; it being held by the Lord Chancellor and the Lords Justices, that the payment of money into Court brought the case within the words of the exception contained in the 17th section of the Charitable Trusts Act, which requires that before any suit, petition, or other proceeding (not being a *matter actually pending*), relating to a charity should be commenced, a certificate should be obtained from the charity commissioners. They considered in this case, that there was a matter actually pending after the money had been paid into Court.

VESTING ORDER.—COPYHOLDS.

Re Howard, Weekly Rep. 1854-5, p. 605.

Where the legal estate of copyholds has actually descended, the consent of the lord is necessary, to obtain a vesting order.

SURETY.—JOINT AND SEVERAL LIABILITY.—NON-EXECUTION OF DEED BY ONE SURETY.

Evans *v.* Bremridge, Weekly Rep. 1855-6, p. 161.

The Anchor Assurance Company granted a loan to Mr. Elton, who, with the plaintiff, as surety, executed a deed of covenant, by which they, together with Mr. Bradley, were expressed to be jointly and severally liable to pay the debt. The plaintiff executed the deed on the faith that it would be executed by Bradley, his co-surety. Bradley, however, never did execute it, and Elton being unable to pay, the plaintiff was sued for the whole amount, and he filed his bill to be discharged from his liability at law. Wood, V. C., held that the company, not having procured the execution of the deed by Bradley, and not having informed the plaintiff that it had not been executed (according to the original intention), the deed must be wholly set aside, with a declaration that the plaintiff was discharged from all liability.

PRIORITY OF JUDGMENTS.—CONSTRUCTION OF STATUTES RELATING TO REGISTRATION.

Beavan *v.* Lord Oxford, 19 Jur. 1121.

It was decided in this case, that a judgment creditor, who registers his judgment, but omits within five years to re-register it, does not by such omission give priority to other judgment creditors, who appear on the register before the end of that period. "When once a person has become purchaser, mortgagee or creditor," said Lord Cranworth, "with notice on the

register of an existing judgment, he knows that such a charge exists, and has no shadow of complaint if it is enforced. The object of the statute was to enable him to ascertain with certainty what judgments exist, not to give him a chance of improving his title by the possible subsequent neglect of a judgment creditor to re-register. Such neglect will, of course, deprive the judgment creditor of his rights against subsequent purchasers, mortgagees, or creditors becoming so before any re-registry has taken place, and so will operate as a protection to them. But there could be no object in protecting those who had thought fit to become purchasers, mortgagees, or creditors, in spite of a judgment of which the register had already apprised them. A person who has completed his title as purchaser before re-registry is not a purchaser within the meaning of the enactment." It was also decided in this case, that there may be valid re-registration, under the 2 & 3 Vict. c. 11, after the expiration of five years, but purchasers, mortgagees, and creditors are not bound to search the register beyond that period.

PAYMENT BY TENANT FOR LIFE OF BOND-DEBTS.—CHARGE ON INHERITANCE.

Morley *v.* Morley, 25 Law J. Chan. 1.

The bill in this case was filed by a tenant for life, with remainder to his first and other sons in tail, and its object was to enforce a claim on the inheritance for the amount of several bond-debts created by the devisor of the estate, which the tenant for life had paid off from time to time after he came into possession. The evidence did not show that he intended at the time of payment to keep them alive against the inheritance, and the suit was not instituted until many years had elapsed after the time when he had so paid off these bonds; so that the Statute of Limitations was a good plea, unless the case came within the principle of the Court with regard to persons having partial interests in estates paying off incumbrances. The Lord Chancellor thus states this principle: "Where any person having any interest in the estate pays a debt which is capable of being made a charge upon the inheritance, and at the same time takes every precaution to show that he has no intention of relieving the inheritance from its liability, the Court will aid him in procuring repayment out of the estate." As to cases where the intention has not thus been shown, the Lord Chancellor states the result of the authorities to be, "When an incumbrance is paid off by a person having a partial interest, *unless there is something to show a contrary intention*, the presumption is that he meant to keep it alive for his own interest; that the omission [to take

an assignment] was a mere oversight, and that the Court will supply that omission by giving him, or causing the proper parties to give him, if necessary, an assignment." In the present case, however, the Court considered that this presumption was rebutted by the circumstances that he succeeded to the property when he was a minor, and he tore off the seal from the bonds as he received them, instead of keeping them to show that he had a charge upon the estate *quantum valeat;* and having permitted a lapse of time beyond that allowed by the Statute of Limitations, he had no right against the estate. It was argued, on behalf of the tenant for life, that he was in the same position as if he had paid off an incumbrance or a charge upon the estate; but it was held, that where a tenant for life pays off a charge upon the estate, he so makes himself a purchaser of part of the inheritance; but when he pays off a bond-debt, even if the debt be assigned, he is only in the same position as any other creditor.

COMMON LAW.

Measure of Damages.

Fletcher *v.* Tayleur, 17 C. B. 21.

The action in this case was brought to recover damages for the breach of a contract for the building and delivery of a ship, which ought under such contract to have been delivered on the 1st of August, 1854, but was not in fact delivered until March, 1855.

The vessel was intended by the plaintiffs—and from the nature of her fittings the defendant must have known the fact—for a passenger ship in the Australian trade.

The cause was tried at the last Liverpool assizes before Crowder, J., who, referring to Hadley *v.* Baxendale (9 Exch. 341), directed the jury in regard to the proper measure of damages in these terms, that "where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it." The jury, under the above direction, assessed the damages at 2,750*l.*—the difference between the net freight which the vessel probably would have earned had she been deli-

vered at the time stipulated for, and the amount actually earned by her when delivered some months later—freights in the particular trade having *ad interim* considerably fallen.

A new trial having been moved for on the ground that the damages were excessive, was refused, they not having been *extravagantly* large, by the Court, which likewise threw out some hints as to the true mode of assessing damages in actions for breach of contract, which are well deserving of attention. Thus, Jervis, C.J., remarked that "it would be extremely convenient if there were some general rule as to the measure of damages applicable to all cases of breach of contract, rather than that the matter should be left at large. *May it not be that the breach of a mercantile contract may be susceptible of estimation according to the average per-centage of mercantile profits?* And Willes, J., added—"It certainly is very desirable that these matters should be based on certain and intelligible principles, and that the measure of damages for the breach of a contract for the delivery of a chattel should be governed by a similar rule to that which prevails in the case of a breach of a contract for the payment of money. *No matter what the amount of inconvenience sustained by the plaintiff in the case of non-payment of money, the measure of damages is the interest of the money only:* and it might be a convenient rule if the measure of damages in such a case as this was held, by analogy, to be the *average profit* made by the use of such a chattel." The method thus suggested for measuring the damages is obviously somewhat different from that usually adopted by the jury under circumstances similar to those above presented, and might not improbably often conduct to a result more satisfactory and equitable than that which could be arrived at according to the present system.

Certificate for Special Jury, when it may be granted.

Leech *v.* Lamb, 25 Law J. Exch. 17.

After the trial of a cause at Nisi Prius, application was made to the judge for a certificate for a special jury. The application was verbally granted by the judge, but no indorsement in pursuance thereof was made on the record. It was held that the judge could not afterwards on summons indorse the certificate, for the stat. 6 Geo. 4, c. 50, s. 34, requires that the indorsement shall be made "immediately" after the trial.

County Court—Corporation.

Taylor *v.* The Crowland Gas and Coke Company, 11 Exch. 1.

A corporate body may be sued in the County Court. It "dwells," within the meaning of the 9 & 10 Vict. c. 95, s. 128,

at the place where its business is carried on, and therefore where a completely-registered joint-stock company carried on its business within twenty miles of the place and within the jurisdiction of the County Court where the plaintiff resided, but several of the shareholders dwelt beyond that distance, and out of such jurisdiction, the Superior Court was held not to have concurrent jurisdiction with the County Court.

New Trial. Costs.

Evans *v.* Robinson, 11 Exch. 40.

Under the Common Law Procedure Act, 1854 (s. 44), "When a new trial is granted on the ground that the verdict was against evidence, the costs of the first trial shall abide the event *unless the Court shall otherwise order.*" This provision applies where the plaintiff, having failed on the first trial, and having obtained a rule absolute for a new trial on the ground that the verdict was against evidence, succeeds at the second trial. He will not under these circumstances be entitled to the costs of the first trial without a special order of the Court.

County Court—New Trial.

The Great Northern Railway Company *v.* Mossop, 17 C. B. 130.

A County Court judge having heard and disposed of an application for a new trial, cannot rehear the case at a subsequent Court.

Liability of Electric Telegraph Company for mistake in delivery of Message.

M'Andrew *v.* The Electric Telegraph Company, 17 C. B. 3.

A section of the above-named company's Act (16 & 17 Vict. c. 203, s. 66) provides, "That the use of any electric telegraph erected or formed under the provisions of the Act for the purpose of receiving and sending messages shall, subject to the prior rights of use thereof for the service of her Majesty, and for the purposes of the company, and *subject also to such reasonable regulations as may be from time to time made or entered into by the company,* be open for the sending and receiving of messages by all persons alike without favour or preference." A condition that "the company will not be responsible for mistakes in the transmission of *unrepeated* messages, from whatever cause they may arise," was held to be a reasonable regulation under the above section of the Act.

Short Notes of New Books.

[*** All Law Books and works of interest to the Legal Profession, forwarded to the Editor of the LAW MAGAZINE, will henceforth be noticed—either shortly, or at length—in its pages.]

A Compendium of the Law of Real and Personal Property connected with Conveyancing, for the use of Students and Practitioners. By Josiah W. Smith, B.C.L. of Lincoln's Inn, Esq., Barrister-at-Law, editor of "Mitford's Chancery Pleadings," &c. London: Stevens and Norton. 1855.

OF this work we propose in our next No. giving a somewhat lengthened review, and on the present occasion, consequently, must confine ourselves to a bare acknowledgment of its receipt.

The Limited Liability Act, 1855, with Precedents for Deeds of Settlement, &c. By Thomas Henry Haddan, M.A., of the Inner Temple, Barrister-at-Law, Vinerian Law Fellow, and late Fellow of Exeter College, Oxford. London: Maxwell. 1855.

THIS is a beautifully-printed and conveniently-arranged edition of the above-mentioned Act, prefaced by some remarks on its policy, and followed by a precedent of a deed of settlement, to which are appended numerous and apparently carefully-considered notes and references to cases. We are not aware that any other edition of this Act has been produced so well adapted for the use of the practitioner, or for perusal by the non-professional. Our space will merely allow of the following extract from this volume, which we believe presents very fairly the arguments, *pro* and *con.*, which have been put forward touching the principle of limited liability.

"It has been argued that unlimited liability follows by way of logical and inevitable deduction from the law of partnership, so that it cannot be entrenched upon without denying fundamental principles of law. And the arguments, as far as the writer understands them, are these:—

"1. It is the fundamental principle of the law of partnership that the one co-partner should be the agent of the other, and have authority to bind him in all matters within the scope of the partnership contract: but if so, the contract is as binding on the sleeping partner as on the active one; and to admit a power to restrict its extent in the case of the former, when confessedly there can be none in the case of the latter by any stipulation to which the creditor is not a party, is to deny the first principle of partnership.

"2. It is argued that the the right to share the profits implies, as

a matter of natural justice, a liability also to the losses, *in solido*, to the full extent of the partner's property. *Qui sentit commodum*, it is said, *sentire debet et onus*.

"As to the first of these arguments, it may be freely admitted that it would be contrary to natural justice, as well as to the principles of the law of partnership, that a creditor or other contractor should be bound by terms to which he has not expressly or by fair implication assented, even as far as regards a party with whom he only contracts through another's agency. But a fallacy surely lies in assuming that in the present case the creditor *does* necessarily contract without such knowledge or assent. If (which is the case necessarily in all companies under the Limited Liability Act) the director must needs contract only to a certain limited extent, so far as regards himself, of course the creditor cannot suppose that the director means to pledge the credit of *any third party* to any greater extent than he pledges his own. And this seems to be a sufficient answer to the argument from agency. If there can be no unlimited contract by the principal, there can of course be no agency for the purpose of making such a contract.

"The second argument, founded on sharing the profits, seems to beg the whole question as to *extent* of liability. No one can deny that participation in profits entitles third parties to presume, *primâ facie*, that the person participating is a partner, and consequently that the partnership contracts are authorized by him; but the question still remains, what are the contracts, and how far they go?"

And in regard to this question the learned author of the work before us enters upon various illustrative remarks, which we recommend to the notice of our readers.

A Constitutional History of Jersey. By Charles Le Quesne, Esq., Jurat of the Royal Court, and Member of the States. London: Longmans. 1856.

To this work we shall refer at length in our next No., whilst noticing the laws and constitution of the island of Jersey.

Besides the books above specified, and works reviewed in the body of this No. of the Magazine, we have received the following:—

Nos. 1 to 4, inclusive, of a Treatise on the Principles of Equity. By John Sidney Smith, Esq., Barrister-at-Law, author of a "Treatise on the Practice of the Court of Chancery"—which will be duly noticed when completed.—Juridical Tracts, by A. Hayward, Esq., Q.C. Part I., reprinted from the *Law Magazine*, whilst under the editorship of the learned writer.—A Letter to Lord Lyndhurst, on the House of Peers in its Judicial character, &c., by J. F. Macqueen, Esq., Barrister-at-Law.—Remarks on the Law of Marriage and Divorce, suggested by the Honourable Mrs. Norton's Letter to the

Queen.—The Validity of a Bequest of Money to be expended in erecting Buildings for a Charity, upon a site to be procured from other sources, considered with reference to the case of Trye *v.* The Corporation of Gloucester, by John Darling, Esq., of the Inner Temple, Barrister-at-Law. Stevens and Norton. Which is a reprint, with some few alterations and corrections, of an article which appeared in the *Law Magazine* for November, 1852.—The Metropolitan Buildings Act (18 & 19 Vict. c. 102), and Notes of Cases, explanatory of its Law and Practice, by Frederick W. Laxton, of the Middle Temple, Barrister-at-Law. London: Butterworths. 1855.

We have also to acknowledge the receipt from Lord Lindsay of the Report of the Proceedings on the Claim recently made by the Earl of Crawford and Balcarres to the original Dukedom of Montrose.

Events of the Quarter.

APPOINTMENTS, &c.

The Right Hon. M. T. Baines, Q.C., a Bencher of the Inner Temple, and formerly President of the Poor-law Board, has been appointed to the Chancellorship of the Duchy of Lancaster, in the place of the Earl of Harrowby. The right hon. gentleman has also a seat in the Cabinet.

Mr. Baron Parke, having resigned the office of Judge of the Court of Exchequer, has been raised to the peerage by the title of Baron Wensleydale, in the West Riding of Yorkshire. The peerage thus conferred is for life only.

We are much gratified in having to record the elevation of Mr. Bramwell, Q.C., to the vacant judgeship. Mr. Bramwell, as one of the commissioners appointed by the Crown for inquiring into the process, practice, and system of pleading in the Superior Courts of Common Law, has fairly entitled himself to the grateful acknowledgments of that profession of which he has for many years been a distinguished ornament, and we doubt not in his judicial career will fulfil the expectations which have been excited by eminence at the Bar.

We believe that the Deputy High Stewardship of the University of Cambridge, rendered vacant by the death of John Cowling, Esq., barrister-at-law, has been conferred upon Mr. John George Shaw

Lefevre, a Bencher of the Inner Temple, and Assistant-Clerk of the Parliaments. Mr. Lefevre was senior wrangler in the year 1818.

Mr. James Campbell, Q.C., has been appointed a Commissioner of Charities for England and Wales, in the place of the Rev. Richard Jones, deceased.

R. W. S. Lutwidge, Esq., has been nominated to the Commissionership in Lunacy, rendered vacant by the death of Mr. Mylne; and we have much pleasure in announcing that John Forster, Esq., of the Inner Temple, barrister-at law, author of "The Statesmen of the Commonwealth," "The Life of Oliver Goldsmith," and other important literary works, has been appointed Secretary to the Commissioners in Lunacy *vice* Mr. Lutwidge. We feel peculiar satisfaction in making this latter announcement, inasmuch as literary merit in the legal profession is rarely indeed recognised or rewarded.

Mr. Pashley, Q.C., has been appointed Assistant-Judge of the Middlesex Sessions, in the place of Mr. Serjeant Adams, deceased.

Mr. Serjeant Miller has been appointed Judge of the Leicestershire County Court, that office having been rendered vacant by the death of J. D. Burnaby, Esq. This, we believe, is the ninth County Court judgeship which, during the preceding four years, has become void by death or resignation.

Sir Laurence Peel having resigned the office of Chief Justice of the Supreme Court at Calcutta, Sir James Colvile has been promoted to that office; and Sir Charles Jackson has been transferred from Bombay to Calcutta as Puisne Judge. The seat on the Bombay Bench, vacated by Sir C. Jackson, was conferred on Sir W. Jeffcott (since deceased), previously Recorder of Singapore; and Mr. Matthew B. Sausse, Q.C., of the Irish Bar, formerly Crown Prosecutor on the Leinster Circuit, has been appointed to fill the vacancy on the Judicial Bench at Bombay, caused by the death of Sir W. Jeffcott.

Mr. Richard M'Causland, of the Irish Bar, has been appointed Recorder of Prince of Wales' Island. And Mr. Charles Shaw, brother of the Recorder of Dublin, has been elected by the Irish Benchers a Law Lecturer to the Queen's Court in Dublin, in the room of Mr. M'Causland.

William Carpenter Rowe, Esq., Q.C., Recorder of Plymouth, has been appointed Chief Justice of Ceylon.

Peter Benson Maxwell, Esq., of the Middle Temple, barrister-at-law, has been appointed Recorder of Penang, in the place of Sir W. Jeffcott, appointed to a seat on the Bombay Bench, and since deceased.

The Queen has been pleased to appoint Alexander Heslop, Esq., to be Attorney-General for the Island of Jamaica; and Henry Cloete,

Esq., to be a Puisne Judge of the Supreme Court of the colony of the Cape of Good Hope.

Mr. Edward Archer Wilde has been appointed Junior Clerk of Assize on the Oxford Circuit, in the place of Lord Truro, resigned.

C. O. Dayman, Esq., barrister-at-law, of the Western Circuit, has been appointed a Metropolitan Police Magistrate, a vacancy on this Bench having been caused by the retirement of Mr. Broderip, after a lengthened and meritorious discharge of magisterial duties.

T. W. Saunders, Esq., of the Middle Temple, barrister-at-law, has been appointed to the Recordership of Penzance, rendered vacant by the resignation of Mr. Collier, Q.C., M.P.

And E. H. Woolrych, Esq., barrister-at-law, of the Oxford Circuit, has been elected Secretary to the Metropolitan Board of Works, after a sharp contest with Mr. Josiah Wilkinson, of the Northern Circuit.

CALLS TO THE BAR.

The undermentioned gentlemen have been called to the Bar during the preceding quarter:—

Michaelmas Term.

Lincoln's Inn.—John Langton Sandford, Francis Mount Barlow, M.A., William Lascelles, Thomas Rees Oliver Powell, William Huskisson Tilghman, B.A., Joseph Henry Woolley, LL.B., Arthur Joseph Munby, B.A., Joseph Loxdale Warren, B.A., Joseph Dixon, Henry Clark, B.A., William Brodrick, B.A., Frederick Williams, Henry James Conington, Joseph Pedley, and Henry Mather Jackson, B.A., Esqrs.

Inner Temple.—Thomas Randle Bennett, M.A., William Murray, Thomas Francis Fremantle, Nathaniel Charles Curzon, B.A., Whitley Stokes, B.A., Herbert Eliot Ormerod, B.A., William Algernon Slade Gully, M.A., Francis Seymour George, B.A., Henry Charles Hall, B.A., Herbert William Fisher, M.A., Francis Philips, B.A., Charles Marshall Griffith, M.A., William Leech, B.A., and Edward Wallace Goodlake, Esqrs.

Middle Temple.—Hopson Pinckney Walker, B.A., Charles William Crouch, B.A., Edward William Pittar, M.A., Edward Clennell Dunn, B.A., Samuel Bruce, LL.B., Edward Henry Lovell, B.A., Charles William Dyer, M.A., and James Cherry, Esqrs.

Gray's Inn.—James Goodson, Esq.

The list of gentlemen called to the Bar during Hilary Term by the Inns of Court has not reached us in time for insertion in our present Number.

EXAMINATION OF STUDENTS OF THE INNS OF COURT.

At the Michaelmas Term Examination, held at Lincoln's Inn Hall, on the 30th and 31st October, and 1st November, 1855, the COUNCIL OF LEGAL EDUCATION awarded to—

Chas. A. Holmes, Esq., of the Inner Temple, a Studentship of fifty guineas per annum, to continue for a period of three years.

Frederick C. J. Millar, Esq., of the Inner Temple, a Certificate of Honour of the first class.

Hopson P. Walker, Esq., of the Middle Temple, William Leech, Esq., of Lincoln's Inn, Reginald John Cust, Esq., of Lincoln's Inn, Charles William Dyer, Esq., of the Middle Temple, J. F. Browne, Esq., of the Middle Temple, and Arthur T. Watson, Esq., of Lincoln's Inn, Certificates that they have satisfactorily passed a Public Examination.

At the Hilary Term Examination, held at Lincoln's Inn Hall, on the 8th, 9th, and 10th days of January, 1856, the COUNCIL OF LEGAL EDUCATION awarded to—

Frederick C. J. Millar, Esq., of the Inner Temple, a Studentship of fifty guineas per annum, to continue for a period of three years.

Henri Fulcher Brunet, Esq., of the Middle Temple, and Thomas Key, Esq., of Lincoln's Inn, Certificates of Honour of the first class.

John Marshall Hayman, Esq., of Lincoln's Inn, a Certificate that he has satisfactorily passed a Public Examination.

THE CIRCUITS.

The ensuing Spring Circuits have been arranged as under:—

Midland Circuit.—Lord Campbell and the Lord Chief Baron.

Norfolk Circuit.—The Lord Chief Justice of the C.P. and Mr. Justice Wightman.

Home Circuit.—Mr. Baron Alderson and Mr. Justice Coleridge.

Oxford Circuit.—Mr. Justice Cresswell and Mr. Baron Bramwell.

Northern Circuit.—Mr. Baron Martin and Mr. Justice Willes.

Western Circuit.—Mr. Baron Platt and Mr. Justice Crowder.

North Wales and Chester Circuit.—Mr. Justice Erle will proceed on this Circuit, and meet Mr. Justice Williams at Chester.

South Wales Circuit.—Mr. Justice Williams.

Mr. Justice Crompton will remain in town as the vacation judge.

MISCELLANEOUS.

MR. BARBER'S CASE.—The Court of Queen's Bench in Michaelmas Term last, made the rule absolute for the readmission of this gentleman; a decision which we believe has given great satisfaction to the Profession and the public. Mr. Barber's singular vicissitudes will form a chapter in "the life of a lawyer" more strange than can be found in either of the entertaining fictions published under that title.

We are glad to see that an effort is making to enable him to resume the practice of his profession with suitable means. In the committee for promoting this object we find the names of Sir Fitzroy Kelly, Mr. Roebuck, Mr. Serjeant Stephen, Mr. Collier, Mr. Serjeant Wilkins, &c. &c., and we have no doubt that their generous object will be promptly and liberally supported.

We extract the following passage from their address to the Profession and the public:—"Thirteen years of the prime of Mr. Barber's life have been spent in a struggle, the severity of which is only equalled by the moral fortitude and indomitable perseverance with which it has been pursued. He has set an imperishable example to the unfortunate and oppressed, and has vindicated his profession from a stain which the supposed offence of one of its members had cast upon it. He is free to resume his professional labours, but the serious cost of the inquiry has not only left him without pecuniary means, but he has unavoidably contracted debts with printers, law stationers, and others, in placing his case before the Profession, the public, and the Courts. Altogether it is a case unparalleled in professional, if not in human, history; and it is felt to be one which powerfully appeals to the sympathy of the community at large, but especially so to the members of the Legal Profession. It is earnestly hoped that such a subscription will be entered into as shall enable Mr. Barber to resume the practice of a solicitor unfettered by debt, and be some, though inadequate, compensation for the loss of his home, his property, and of thirteen years in the professional race in which at the time of his apprehension he stood so well; not to mention the unspeakable horrors of penal suffering which he has so undeservedly endured."

NECROLOGY.

October.

12th. SMITH, J. B., Esq., barrister-at-law, 4, Garden-court, Temple.

November.

10th. TWISS, George Joseph, Esq., formerly solicitor, of Cambridge, for many years coroner for the county of Cambridge, and deputy-registrar of the diocese of Ely, aged 51.

11th. The Right Hon. Thomas Lord Truro, at his residence, in Eaton-square. Of the career of this eminent lawyer, we shall hope to present a sketch to our readers in one of our forthcoming numbers.

13th. Cheere, George, Esq., of 38, Lincoln's-inn-fields, aged 53.

16th. Shotton, Mr. J. G., at Lincoln, aged 30.

27th. Ashton, William Garfitt, at Newnham, Cambridge, Clerk of the Peace, aged 60.

30th. Allum, Mr. Richard, of the Prerogative Registry-office, Doctors' Commons, aged 76.

December.

2nd. Forbes, Arthur, Esq., at Torquay, one of the town-clerks of Glasgow.

3rd. Gem, Mr. William Henry, at Birmingham, many years clerk to the magistrates of that town, aged 64.

7th. Recknell, Mr. Samuel, formerly of the Solicitors' Office, Customs, aged 73.

12th. Cowling, John, Esq., of the Middle Temple, barrister-at-law, a distinguished member of the northern circuit, at his residence, in Albemarle-street. Mr. Cowling was educated at St. John's College, Cambridge, at which university he became senior wrangler, in the year 1824. He was called to the Bar on the 9th of November, 1827, and rapidly attained to an extensive practice both on circuit and in town, which he continued to maintain down to the period of his extremely sudden and much-lamented death.

26th. Douglass, James Ley, of Market Harborough, solicitor, aged 58.

27th. Kirkpatrick, Robert, Esq., solicitor, late of 6, Lincoln's-inn-fields.

January.

4th. Henderson, William, Esq., barrister-at-law.

8th. Harrison, Eldred, Esq., solicitor, at Kendal, aged 34.

10th. Adams, Mr. Serjeant, Assistant-Judge of the Middlesex Sessions, at his residence, in Hyde-park-street.

Recently, in India, Sir William Jeffcott, Recorder of Penang, who had, just previously to his decease, received the appointment of Puisne Judge at Bombay, but died before he was able to take his seat.

List of New Publications.

Archbold—The Bankrupt Law; with the Statutes and other authorities, to the present time: including the New Rules in Bankruptcy, and the New Tables of Costs. By J. F. Archbold, Esq., Barrist[illegible] Second Edition. 12mo. 16s. cloth.

Ayckbourn—Forms of Practical Proceedings in the High Court of Chancery, with the Orders of the Court, from 1849 to 1856, forming the Second Volume of the Fifth Edition of "Ayckbourn's Chancery Practice." By H. Ayckbourn, Solicitor's Clerk. 12mo. 10s. boards.

Bayford—The Judgment of Dr. Lushington, delivered in the Consistory Court of London, in the Cases of Westerton *v.* Liddel and Horne and others; and Beale *v.* Liddel and Parke and Evans, on Dec. 5, 1855. Edited by A. F. Bayford, D.C.L. Royal 8vo. 2s. 6d. sewed.

Broom—Commentaries of the Common Law, designed as Introductions to its Study. By Herbert Broom, M.A., Barrister-at-Law, Reader in Common Law to the Inns of Court. 8vo. 1*l.* 11s. 6d. cloth.

Burton—An Elementary Compendium of the Law of Real Property. By W. H. Burton, Esq. The Eighth Edition, with Notes, and an Introductory Chapter. By E. P. Cooper, M.A., Barrister. 8vo. 24s. cloth.

Chitty—Archbold's Practice of the Court of Queen's Bench in Personal Actions and Ejectment, including the Practice of the Courts of Common Pleas and Exchequer. By T. Chitty, Esq., Barrister. Ninth Edition. By S. Prentice, Esq., Barrister. Two Vols. Royal 12mo. 2*l.* 8s. cloth.

Chitty—Forms of Practical Proceedings in the Courts of Queen's Bench, Common Pleas, and Exchequer of Pleas; with Notes and Observations thereon. By T. Chitty, Esq., Barrister. Seventh Edition. Royal 12mo. 30s. cloth.

Clayton—The Elements of Conveyancing; with Practical Illustrations and Select Forms. By W. C. Clayton, M.A., Barrister. 8vo. 10s. cloth.

Cox—The Practice of Summary Convictions in Larceny, under the Act of 1855. By E. W. Cox, Esq., Barrister. 12mo. 5s. cloth.

Creasy—The Rise and Progress of the English Constitution. By E. S. Creasy, Esq., Barrister. Third Edition. Crown 8vo. 7s. 6d. cloth.

Dowdeswell—The Merchant Shipping Acts, 1854 and 1855; with a Readable Abridgment of the former Act, and an Explanation of the Law relating to it: also Notes and an Appendix. By G. M. Dowdeswell, Esq., Barrister. 12mo. 14s. cloth.

Fawcett—The Criminal Justice Act; with Notes and Forms. By J. Fawcett, Esq., Barrister. 12mo. 1s. 6d. sewed.

Francis—The Law of Charities: comprising the Charitable Trusts Act, 1853, and the Charitable Trusts Amendment Act, 1855; with Notes, Forms, &c. &c. By P. Francis, Esq., Barrister. Second Edition. 12mo. 9s. 6d. cloth.

Glen—The Consolidated and other Orders of the Poor Law Commissioners and of the Poor Law Board; with Explanatory Notes, elucidating the Provisions of the several Orders, and an Index. By W. C. Glen, Esq., Barrister. Third Edition. 12mo. 9s. cloth.

Haddan—The Limited Liability Act, 1855; with Precedents of a Deed of Settlement and Notes, &c. By T. H. Haddan, Esq., Barrister. Post 8vo. 8s.

Hayward—Juridical Tracts. By A. Hayward, Esq., Q.C. 8vo. 3s. 6d. sewed.

Laxton—The Metropolitan Buildings Act, 1855; with Notes of Cases, explanatory of its Law and Practice; with Appendices, containing the Unrepealed Sections of the former Act, List of Surveyors, &c. By F. W. Laxton, Esq., Barrister. 12mo. 2s. sewed.

Le Quesne—A Constitutional History of Jersey. By Charles Le Quesne, Esq., Jurat, Royal Court. 8vo. 18s. cloth.

Keane—The Nuisance Removal Act for England, 1855; with Introductory Comments. By D. D. Keane, Esq., Barrister. 12mo. 3s. boards.

Lumley—The Law of Parochial Assessments, explained in a Practical Commentary on the Statute 6 & 7 Will. 4, c. 96. By W. G. Lumley, Esq., Barrister. Third Edition. 12mo. 6s. 6d. cloth.

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Lush's Practice of the Superior Courts of Common Law at Westminster in Actions and Proceedings connected therewith, over which they have a Common Jurisdiction; with Forms; also Introductory Treatises respecting Parties and Actions; Attornies and Town Agents; Suing in Person, by Attorney, or *in Forma Pauperis*, &c.; and an Appendix, containing the General Rules, the Authorised Table of Costs, Fees, &c. Second Edition. By James Stephen, Esq., Barrister. 8vo. 42s. cloth.

Macqueen—Letter to the Right Hon. Lord Lyndhurst on the Constitution of the Appellate Jurisdiction of the House of Peers. By J. F. Macqueen, Esq., Barrister. 8vo. 1s. sewed.

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Saunders—The Practice of Magistrates' Courts, including that under the Larceny Summary Jurisdiction Act, 1855. By T. W. Saunders, Esq., Barrister. 12mo. 9s. 6d. cloth.

Smith—A Compendium of the Law of Real and Personal Property, connected with Conveyancing, for the use of Students and Practitioners. By J. W. Smith, B.C.L., Barrister. 8vo. 28s. cloth.

Stone—The Justice's Pocket Manual; or Guide to the Ordinary Duties of a Justice of the Peace; with an Appendix of Forms. By S. Stone, Solicitor. Sixth Edition. 12mo. 12s. cloth.

Tapping—The Factory Acts; with their respective Schedules; also Notes, and a full Reference to Cases; together with a Copious Index. By T. Tapping, Esq., Barrister. 12mo. 3s. boards.

Tuson—The British Consul's Manual; being a Practical Guide for Consuls, as well as for the Merchant Shipowner and Master Mariner, in all their Consular transactions, &c. &c. By E. A. Tuson. 8vo. 15s. cloth.

Woodfall's Practical Treatise on the Law of Landlord and Tenant; with a Collection of Precedents and Forms. By S. B. Harrison. The Seventh Edition. By H. Horn, Esq., Barrister. Royal 8vo. £1 11s. 6d. cloth.

Erratum.—In Art. V. at page 71 of the present number, in note, *read* "1850" *for* "1832."

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